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THE
LAW OF BANKING.

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PREFACE.

IN the following pages I have endeavoured to present a comprehensive statement of the living law of banking, arranged in a natural and convenient form.

All that can fairly be considered to have a special bearing upon bankers and their business is within the scope of the work. A wide field of law, affecting in varying degrees the community at large, is thus comprised, and its adequate and proportional treatment has necessitated the production of a volume of considerable length.

The facts of decided cases and the *ipsissima verba* of judges and of statutory enactments, so far as material, have been set forth in their appropriate places. It is hoped that, in this way, the characteristic advantages of collections and digests of cases, and commentaries on Acts of Parliament, as well as those of ordinary text-books, have been secured, and their respective inconveniences avoided. At the same time it has been found possible to dispense with a lengthy appendix of unassimilated statutes, which can seldom be relied upon to speak entirely for themselves. The Bills of Exchange Act, however, has the signal merit of being a consecutive and

compendious statement of the law relating to instruments with which this treatise is largely concerned; and, accordingly, although for the most part incorporated in the text, it is reprinted at length, together with references to the cases which have been decided upon its terms.

The constitution of banking companies of a class which ceased to exist in comparatively recent years is succinctly treated in an Appendix. With this exception, whatever is of merely historic interest, and which, consequently, is not law, has been excluded.

In view of the primary importance of form and order in the exposition of law, great pains have been bestowed upon the arrangement of the work. The necessity of a clear discrimination between the various functions of the banker, and the convenience of discussing them according to the ordinary sequence of events in his relations with customers, have been adopted as the guiding principles of classification; and every sentence should be found in what is thus indicated as its proper position. For hasty reference, I trust that ample facilities have been provided in the Tables and Index.

HEBER HART.

GOLDSMITH BUILDING,
TEMPLE.

June, 1904.

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APPENDIX I.

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		ss. 31—43, 45, 46	-	-	- 736—738
		ss. 56, 57	-	-	- 739
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58 Vict. c. iii. (Crédit Foncier of Mauritius)	-	-	-	-	- 856
58 & 59 Vict. c. 16 (Finance), s. 9	-	-	-	-	- 477
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		c. xliv. (Bank of Bolton)	-	-	- 856
59 Vict. c. 8 (Life Assurance Companies (Payment into Court))	-	-	-	-	- 823
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59 & 60 Vict. c. 25 (Friendly Societies), s. 33	-	-	-	-	- 246
60 Vict. c. 14 (Metropolitan Police Courts (Holidays)), s. 1	-	-	-	-	- 102
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61 & 62 Vict. c. 13 (East India Loan), s. 8	-	-	-	-	- 129
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62 & 63 Vict. c. 9 (Finance), s. 6	-	-	-	-	- 376
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		c. 20 (Bodies Corporate (Joint Tenancy)), s. 1	-	-	- 121
		c. 22 (Summary Jurisdiction), s. 3	-	-	- 334
63 Vict. c. 2 (War Loan), s. 4	-	-	-	-	- 128
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1 Edw. VII. c. 10 (Larceny), ss. 1, 2	-	-	-	-	- 103
2 Edw. VII. c. 7 (Finance), s. 11	-	-	-	-	- 125
3 Edw. VII. c. 1 (Bank Holiday (Ireland))	-	-	-	-	- 101
		c. 3 (Consolidated Fund), s. 3	-	-	- 128
		c. 12 (Post Office (Money Orders)), s. 1	-	-	- 777
		c. 32 (Appropriation), s. 3	-	-	- 122

Part I.

BANKERS AND BANKS.

CHAPTER I.

BANKER AND CUSTOMER.

Definitions.

WHERE the business (*a*) of banking is carried on by persons associated in partnership, or by a company, strictly speaking there is, in the one case, a banking firm, and, in the other, a banking company. For the sake of convenience, however, the word “banker” will be used throughout this treatise as it is in the Bills of Exchange Act, 1882 (*b*), to include a body of persons, whether incorporated or not, who carry on the business of banking (*c*).

A **Banker** is one who, in the ordinary course of his business, receives money, which he repays by honouring the cheques of the persons from or on whose account he receives it (*d*).

(*a*) Banking is a business, but it “is not strictly a trade”: per Willes, J., in *Harris v. Amery* (1865), 1 C. P. 148, at p. 154, cited by Jessel, M. R., in *Smith v. Anderson* (1880), 15 Ch. D. 247, at p. 259.

(*b*) 45 & 46 Vict. c. 61, s. 2.

(*c*) Cf. the Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 29.

(*d*) The definition of a banker is elaborately discussed in *Stafford v. Henry* (1849), 12 Ir. Eq. R. 400, and in *Morse*

on the Law of Banking (American), 4th ed. at pp. 6—11, as well as in many other places. Great diversity of view seems to prevail upon the subject. But it is conceived that the simple definition in the text is, at the present day and for the purposes of an English law-book, sufficient. Cf. the speeches in *Foley v. Hill* (1848), 2 H. L. C. 28, at pp. 36, 37, 43 and 44, cited in Part II. Chap. 2; and *Halifax Union v. Wheelwright* (1875), L. R. 10 Ex. 183, at p. 193.

The legal and the popular view of the distinctive and essential characteristics of banking appear to coincide. For example, a savings bank, from which money cannot be withdrawn by a cheque in the ordinary form, is not a bank within the meaning of a statute relating to banking companies (*e*), or in the ordinary signification of the term (*f*).

A Customer is one who has an account with a banker (*g*).

The Banker's Functions.

I.—It follows from the definition of a banker which is given above that normally he is the debtor of his customer and bound to discharge his indebtedness by honouring his customer's cheques.

The balance standing to the credit of a customer on his current account represents money which he has lent to the banker. Cash paid by the customer into his account, and the proceeds of negotiable instruments and other orders for the payment of money delivered by him to the banker for collection and for that account, are not, in the legal sense, deposited with, or entrusted to, the banker, but are merely lent to him. Accordingly, the property in the cash passes to the banker immediately, and the property in the proceeds of the drafts as soon as they are collected by him (*h*). Thenceforth he is free to do what he pleases with the money: his only liability in respect of it being a personal obligation to his customer to honour cheques drawn by him upon his account (*i*).

The banker may therefore be considered, primarily and naturally, as the drawee of cheques; although, in the ordinary conduct of his business, he is placed in many other relations to his customer.

II.—A banker usually undertakes, expressly or impliedly, to honour bills of exchange accepted by his customer and made payable

(*e*) *Ex parte Coe* (1861), 31 L. J. Bank. S; 3 De G. F. & J. 335; 10 W. R. 138; Trustee Savings Bank Act, 1863 (26 & 27 Vict. c. 87).

(*f*) For the statutory provisions as to savings banks, see 24 & 25 Vict. c. 14; 26 & 27 Vict. c. 14; 26 & 27 Vict. c. 87; 37 & 38 Vict. c. 73; 43 & 44 Vict. c. 36;

50 & 51 Vict. c. 40; 50 & 51 Vict. c. 47; 54 & 55 Vict. c. 21; 56 & 57 Vict. c. 69.

(*g*) See pp. 491—493, *infra*.

(*h*) See Part II. Chap. 2; Part V. Chap. 7.

(*i*) See Part III. Chap. 1.

at his banking-house to the extent of his customer's balance, or to an agreed amount. Sometimes he accepts bills drawn upon him by his customer (*k*).

Thus the banker, in the aspect of the debtor of his customer, must be considered as one to whom bills accepted or drawn by the customer, as well as cheques, are presented for payment.

III.—The banker invariably acts as the agent of his customer.

The current account involves the collection of cheques and other orders delivered to him by his customer in order that their proceeds may be credited to him. The banker is accordingly a collecting agent.

Moreover, in the ordinary course of business, at the request of his customer, he performs other services, such as making periodical payments on his behalf, procuring the purchase or sale of marketable securities, obtaining powers of attorney and the like (*l*). In all these matters he acts as an agent.

IV.—The banker is commonly the bailee of title-deeds and other valuable articles in small compass entrusted to him by his customer for safe custody.

V.—A banker is also a lender of money (*m*).

The profitable conduct of the business of banking necessarily involves the lending of money, either by way of allowing overdrafts on current accounts, making loans in the form of advances, or discounting bills. The latter is not technically lending, but in reality it amounts to it (*n*).

Lending is naturally accompanied by the acquisition of various kinds of security, whereby the banker becomes the obligee of bonds of suretyship, a mortgagee, a pledgee, or a creditor invested with a lien implied by law.

(*k*) A London banker only accepts inland bills drawn by his customers in very rare instances. Bills drawn by country bankers, or foreign correspondents, are accepted in pursuance of letters of credit previously granted.

(*l*) See Part VII. Chap. 3.

(*m*) But not a "money-lender": see Money-lenders Act, 1900 (63 & 64 Vict. c. 51), s. 6 (d).

(*n*) See Part VIII. Chap. 2.

In so far as the banker lends to a customer their normal relations are inverted.

VI.—Incidentally the business of banking involves the issue in exchange for money of instruments whereby the banker in effect acknowledges his obligation to pay money or honour drafts to, or in favour of, the holder, or other person entitled under the terms thereof, as the case may be.

Bank notes, accountable or deposit receipts, letters of credit and circular notes are documents of this nature.

Constitution of Banks.

At the present time the business of banking may be, and in fact is, carried on in England by (1) private firms of not more than ten members; (2) companies registered under the Companies Acts; (3) the Bank of England; (4) banks constituted by Royal Charter and special Acts of Parliament to carry on business in the colonies, India, or foreign countries; and (5) banks established elsewhere than in England (*o*).

(*o*) See note (*b*) on the next page. Companies formed before the 6th May, 1844, and not subsequently registered, occupied a distinctive legal position. A knowledge of the rules by which they were governed is still necessary for a

due appreciation of many of the cases in the books; but it is nevertheless of steadily diminishing importance. A statement of the law relating to such companies will be found in Appendix I. of this treatise.

CHAPTER II.

BANKING FIRMS.

THE business of banking may be carried on by one person alone, or by any number of persons not exceeding ten in partnership together (*a*).

Returns.

Every one carrying on the business of banking in England or Wales must annually, within the first sixteen days of January, make a return to the Commissioners of Inland Revenue of his name, residence and occupation, and of the name of the firm under which he carries on the business and of every place where such business is carried on. A partnership or company carrying on the business of banking must similarly make a return of the name, residence and occupation of every person composing or being a member of such partnership or company, and of the name under which they carry on the business and of every place where they carry it on (*b*).

The penalty for an omission or refusal to make such return, or wilfully making other than a true return, of the person or persons above indicated is 50*l.* (*b*).

(*a*) Companies Act, 1862 (25 & 26 Vict. c. 89), s. 4.—It is not lawful for any clergyman, if beneficed or performing ecclesiastical duty, to act as a director or managing partner in, or to carry on in person, the business of banking. But the only consequence of his doing so is the personal risk which he incurs of suspension and deprivation: 1 & 2 Vict. c. 106, ss. 29–31; 4 & 5 Vict. c. 14, s. 1; *Lewis v. Bright* (1855), 4 E. & B. 917.

(*b*) 7 & 8 Vict. c. 32, s. 21.—Returns must be made under this Act by companies carrying on the business of

banking in England or Wales but not registered under the Companies Acts. This is the case with banks established outside of England and Wales (such as the Royal Bank of Scotland, incorporated by Royal Charter, 1727; the Chartered Bank of India, Australia and China, incorporated by Royal Charter, 1853; the Commercial Bank of India, registered at Calcutta; the National Bank of Egypt, constituted under Egyptian law; the Crédit Lyonnais and the Deutsche Bank), or under the Friendly Societies Acts (such as the London Trading Bank).

The Commissioners must, on or before the 1st March in every year, publish in some newspaper circulating within each town or county respectively a copy of the return so made by every banker or banking partnership carrying on the business of bankers within such town or county respectively (c).

Relations with Customers and Strangers.

The relations of partners to persons dealing with them are regulated by the following sections of the Partnership Act, 1890 (53 & 54 Vict. c. 39) :—

Power of Partner. 5. Every partner is an agent of the firm and his other partners for the purpose of the business of the partnership; and the acts of every partner who does any act for carrying on in the usual way business of the kind carried on by the firm of which he is a member bind the firm and his partners, unless the partner so acting has in fact no authority to act for the firm in the particular matter, and the person with whom he is dealing either knows that he has no authority, or does not know or believe him to be a partner.

The powers of a partner as to borrowing are dealt with in Part VIII. Chap. 3.

Acts on behalf of Firm. 6. An act or instrument relating to the business of the firm and done or executed in the firm-name, or in any other manner showing an intention to bind the firm, by any person thereto authorised, whether a partner or not, is binding on the firm and all the partners.

Provided that this section shall not affect any general rule of law relating to the execution of deeds or negotiable instruments (d).

Contracts for Private Purposes. 7. Where one partner pledges the credit of the firm for a purpose apparently not connected with the firm's ordinary course of business, the firm is not bound, unless he is in fact specially authorised by the other partners; but this section does not affect any personal liability incurred by an individual partner.

(c) *Ibid.* Cf. 43 & 44 Vict. c. 20, s. 57.

(d) Cf. Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), ss. 23, 89.

Restriction on Authority. 8. If it has been agreed between the partners that any restriction shall be placed on the power of any one or more of them to bind the firm, no act done in contravention of the agreement is binding on the firm with respect to persons having notice of the agreement^(e).

Liability of Partners. 9. Every partner in a firm is liable jointly with the other partners, and in Scotland severally also, for all debts and obligations of the firm incurred while he is a partner; and after his death his estate is also severally liable in a due course of administration for such debts and obligations, so far as they remain unsatisfied, but subject in England or Ireland to the prior payment of his separate debts.

Liability for Wrongs. 10. Where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the firm, or with the authority of his co-partners, loss or injury is caused to any person not being a partner in the firm, or any penalty is incurred, the firm is liable therefor to the same extent as the partner so acting or omitting to act.

Misapplication of Property. 11. In the following cases, namely—

- (a) Where one partner, acting within the scope of his apparent authority, receives the money or property of a third person and misapplies it; and
- (b) Where a firm in the course of its business receives money or property of a third person, and the money or property so received is misapplied by one or more of the partners while it is in the custody of the firm;

the firm is liable to make good the loss.

If the partner is acting for himself alone, in a matter unconnected with the business of the firm, the firm will not be liable. This is illustrated by the following cases.

In *Ex parte Eyre, In re Wright (f)*, a customer of a banking firm, whose practice it was to receive deposits at their banking-house of boxes of securities belonging to their customers for safe

^(e) As to a firm being affected by notice through a partner common to its own firm and that with which it is contracting, see *Steele v. Stuart* (1866), 2 Eq. 84; 14 L. T. 620. Cf. *In re Fenwick, Stobart & Co., Deep Sea Fishery Co.'s Claim*, [1902] 1 Ch. 507.

^(f) (1842), 1 Ph. 227; 3 Mont. D. & D. 12; 12 L. J. Ch. 266; 7 Jur. 162.

custody, lent part of the securities contained in his box to the firm, upon an undertaking to replace them in three months, or sooner if required; and he afterwards lent other parts of such securities to J. W., one of the partners in the firm, on his own separate account, other securities being on both occasions deposited by the respective borrowers, according to agreement, in pledge for those which were borrowed. After the expiration of three months from the time of the first loan the firm, with the consent of the customer, deposited other securities in the box in exchange for those first pledged, and afterwards became bankrupt, when it appeared that the customer had been regularly credited in the books of the firm with interest on all the securities borrowed, but that J. W. had, without the knowledge either of his co-partners or the customer, abstracted the securities pledged by himself upon the second loan, and had applied the proceeds to his own individual use. It was held that the firm was not responsible for the abstraction by J. W. of the securities pledged upon the second loan, although the key of the box, as well as the box itself, was left in the custody of the firm, inasmuch as it did not appear that the firm had any authority to open the box or to examine its contents; and consequently that the customer had no right of proof, in respect of the second loan, against the joint estate, but only against the separate estate of J. W. (g).

In *Bishop v. Countess of Jersey* (h) Wood, a partner in the firm of C. & Co., advised the plaintiff, who was a customer of the bank, to sell out some Dutch stock, telling her the firm could procure for her better security, and that he had one in view. He said the money was, in fact, wanted by his own son, who was in trade. The plaintiff sold out the stock and paid the money into the bank. She then gave Wood a cheque payable to a third person named, or bearer, in order that he might draw it out and invest it. He drew it out and gave her his son's promissory note, on the back of which was endorsed his own guarantee, and also gave her a policy

(g) See the observations of James, V.-C., in *Dundonald (Earl of) v. Masterman* (1869), 7 Eq. 504, at p. 516.

(h) (1854), 2 Drewry, 143; 23 L. J. Ch. 483.

of assurance on the life of the son. Wood misapplied the money and absconded, and the supposed security proved worthless. The interest on the money was regularly carried to the plaintiff's account in the meantime in the books of the bank, but by whom did not clearly appear. All these transactions took place at the banking-house, and the plaintiff had no acquaintance or dealings with Wood except as banker and a member of the firm. The other partners did not appear to have known of these transactions at the time they took place, nor was there anything to show that they knew anything till after Wood had absconded. Vice-Chancellor Kindersley held that these partners were not liable for the loss occasioned by Wood's fraud upon the plaintiff, as the transaction was not within the scope of a banker's business, and was not recommended or sanctioned by the other partners.

In giving judgment the Vice-Chancellor observed: "It is said that it is the practice of bankers generally to invest the money of their customers for them. But it is notorious that their practice is not to act for their customers as money scriveners or agents generally, to find investments for their money, but if a customer sends them, with a power of attorney, a letter of instructions, directing them to sell a particular sum of stock, they will do so; or if the customer wishes a particular investment in the funds, and directs them to lay out his money in the purchase of particular stock, and debit him with the amount, they will do so; and when they do, be it observed, they do so ordinarily without a cheque, but on a particular letter of instructions. But how does that practice apply to this case? It is not within the scope of the business of bankers to seek or make investments generally for their customers" (i).

But when "the firm has, in the ordinary course of its business, obtained possession of the property of other people, and has then parted with it without their authority" (k), the firm will be liable.

In *Ex parte Biddulph* (l) a partner in a bank had drawn out

(i) See also *Coomer v. Bromley* (1852), 5 De G. & S. 532; *Tendring Hundred Waterworks Co. v. Jones*, [1903] 2 Ch. 615.

(k) Lindley on Partnership, 6th ed. p. 170.

(l) (1849), 3 De G. & S. 587.

part of the balance standing to the account of the trustees of a will under which he was interested, without the authority of the trustees, and invested it upon a canal mortgage, which was an unauthorised security. On the bankruptcy of the bankers, it was held that the *cestuis que trustent* were entitled to prove against the joint estate.

In *Sadler v. Lee* (*m*) A., B. and C. executed a power of attorney empowering a banking firm, consisting of E., F. and G., "jointly and severally" to receive the dividends of certain stock, and to sell out the stock itself. The power was sent by the bankers to their broker, who deposited it with the Bank of England. F. alone clandestinely sold out the stock, but the firm had credit for the proceeds. The sale was concealed, and the amount of dividends for some time accounted for. It was held that the firm was liable (*n*).

So, where money of a third person has been placed to the account of a firm, or otherwise become part of their funds, and the partners have been aware, or had the means of knowing, that it was the money of such third person, they will be liable to him if it is misapplied by a member of their firm (*o*).

In *Stone v. Marsh* (*p*) A., B. and C. were proprietors of stock as trustees, and C., D. and E. were bankers. C. executed a letter of attorney, empowering D. and E. to sell the stock, and forged the signature of A. and B. The stock was sold, and transferred in the books of the Bank of England to the credit of the buyers, and the produce of the stock was paid to the credit of C., D. and E. at their bankers. C. then drew out the money by a cheque signed by him in the name of his firm, and applied it to his own use. He was afterwards tried and convicted of forging a similar instrument.

(*m*) (1843), 6 Beav. 324; 12 L. J. Ch. 407.

(*n*) See also *De Ribeyre v. Barclay* (1857), 23 Beav. 107; 26 L. J. Ch. 747.—The case of *Hume v. Bolland* (1832), 1 C. & M. 130, seems to be against the current of authority, and inconsistent with the principles adopted in the Act.

(*o*) *Marsh v. Keating* (1834), 1 Bing. N. C. 198; 2 Cl. & F. 250; *Reid v.*

Rigby & Co., [1894] 2 Q. B. 40; per Farwell, J., in *Jacobs v. Morris*, [1901] 1 Ch. 261, at pp. 269, 270; and per Stirling and Cozens-Hardy, L. J., in the same case, [1902] 1 Ch. 816, at pp. 833, 834. Cf. Lindley on Partnership, 6th ed. pp. 171, 176, note (*p*); and Pollock on Partnership, 7th ed. p. 47, note (*3*).

(*p*) (1827), 6 B. & C. 551.

It was held that the money received by the banking-house constituted a debt due from them to the trustees (*q*).

Joint and several Liability. 12. Every partner is liable, jointly with his co-partners, and also severally, for everything for which the firm, while he is a partner therein, becomes liable under either of the two last preceding sections.

Improper Employment of Trust Money. 13. If a partner, being a trustee, improperly employs trust property in the business or on the account of the partnership, no other partner is liable for the trust property to the persons beneficially interested therein.

Provided as follows:—

- (1.) This section shall not affect any liability incurred by any partner by reason of his having notice of a breach of trust; and
- (2.) Nothing in this section shall prevent trust money from being followed and recovered from the firm, if still in its possession or under its control.

“Holding Out.” 14.—(1.) Every one who, by words spoken or written, or by conduct, represents himself, or who knowingly suffers himself to be represented, as a partner in a particular firm, is liable as a partner to any one who has, on the faith of any such representation, given credit to the firm, whether the representation has or has not been made or communicated to the person so giving credit, by or with the knowledge of the apparent partner making the representation, or suffering it to be made.

(2.) Provided that where, after a partner's death, the partnership business is continued in the old firm-name, the continued use of that name, or of the deceased partner's name, as part thereof shall not of itself make his executor's or administrator's estate or effects liable for any partnership debts contracted after his death.

Admissions and Representations. 15. An admission or representation made by any partner concerning the partnership affairs, and in the ordinary course of its business, is evidence against the firm.

Notice to Acting Partner. 16. Notice to any partner who

(*q*) Cp. *Marsh v. Keating*, see note (*o*), & M. 315; *Ex parte Bolland* (1834),
supra; *Ex parte Bolland* (1828), Mont. 1 M. & A. 570.

habitually acts in the partnership business of any matter relating to partnership affairs operates as notice to the firm, except in the case of a fraud on the firm committed by or with the consent of that partner.

Changes in Firm.

A change in the composition of a firm amounts in law to the dissolution of the old firm and the creation of a new one.

Accordingly, the rights and obligations of the old firm do not devolve upon the members of the reconstructed partnership, except in so far as third parties affected may assent.

Thus, a change in the composition of a firm may have the effect of discharging sureties for its debtors or for itself (*r*).

So where securities have been deposited to cover future advances by bankers, *prima facie* they extend only to advances made before any change in the firm (*s*).

On the other hand, payments to a new firm will not discharge a debt owing to its predecessor, unless the members of the latter have assented to them (*t*).

Position of Incoming Partner.

The Partnership Act provides—

17.—(1.) A person who is admitted as a partner into an existing firm does not thereby become liable to the creditors of the firm for anything done before he became a partner (*u*).

In order that the new partner may become liable for an existing debt of the old firm, it is necessary that he, either alone or as a member of the new firm, should assume the liability upon it, and that the creditor should agree to accept the new partner or the new

(*r*) See Part VIII. Chap. 5.

(*s*) Per Lord Eldon, in *Ex parte Kensington* (1813), 2 V. & B. 79, at p. 83. Cf. *Bank of Scotland v. Christie* (1840), 8 Cl. & F. 214; *Ex parte M'Kenna* (1861), 3 De G. F. & J. 629. See Part VIII. Chap. 7, sect. 1.

(*t*) *Jones v. Maund* (1839), 3 Y. & C. Ex. 347.

(*u*) See *Beale v. Caddick* (1857), 2 H. & N. 326; 26 L. J. Ex. 356; *Scott v. Beale* (1859), 6 Jur. N. S. 559; and the note on this case in Lindley on Partnership, 6th ed. p. 238 (*g*).

firm, as the case may be, as his debtor or debtors, and to discharge the old firm from liability (x).

Position of Retiring Partner.

As to Debts of Old Firm. 17.—(2.) A partner who retires from a firm does not thereby cease to be liable for partnership debts or obligations incurred before his retirement.

(3.) A retiring partner may be discharged from any existing liabilities, by an agreement to that effect between himself and the members of the firm as newly constituted and the creditors, and this agreement may be either express or inferred as a fact from the course of dealing between the creditors and the firm as newly constituted.

Discharge by Payment.—Whether a debt is still subsisting or has been discharged by payment will often depend upon the rules as to the appropriation of payments which are discussed in Part II. Chap. 4.

Cases of Continuance of Liability.—In *Devaynes v. Noble, Sleech's Case* (y), it was held that a creditor, by leaving money in the hands of the surviving partners in a bank, did not thereby constitute a new contract with them, or lose his remedy against the estate of the deceased partner; that there was no rule of convenience fixing any period within which a creditor not making his demand on the surviving partners would be held to have waived his right against the estate of the deceased partner; and that, although a creditor by drawing on the surviving partners after notice of the death of the deceased partner recognized them as his debtors, he did not so recognize them to the exclusion of the liability of the estate of the deceased.

In *Harris v. Farwell* (z) A. was in partnership with B., C. and D. as bankers, and was also a partner in another banking firm with B. and C. A. died, and E. was admitted into the first partnership. The two firms became bankrupt, and under an order

(x) See *Rolfe and the Bank of Australasia v. Flower, Salting & Co.* (1866), L. R. 1 P. C. 27, at p. 38.

(y) (1816), 1 Merivale, 539.

(z) (1846), 13 Beav. 403; 15 L. J. Ch. 185.

of the Court their estates were consolidated. The plaintiff, who had been a creditor of the first firm in A.'s lifetime, received a dividend out of the consolidated estate. It was held that A.'s estate was not thereby released from the plaintiff's claim.

So where a customer received interest for four years after the death of one of the partners and the admission of a new partner, and upon the bankruptcy of the new firm proved against them, swearing that they were indebted to him for money received to his use, it was held that the separate estate of the deceased partner had not been discharged (a).

In *Gough v. Davies* (b) a person who had deposited money with bankers and taken their accountable receipts for it, left the money in the bank after a dissolution of the original firm and the constitution of a new one, which consisted of some of the members of the old bank together with other persons. He received interest regularly from the new firm, and continued his business with them in the common course until they became insolvent four years afterwards. It was held that these circumstances afforded no evidence of the discharge of the former partners in the firm from their liability to the customer (c).

In *In re Head, Head v. Head* (No. 1) (d), a customer of the Edenbridge Bank left 1,400*l.* on deposit with the original firm of G. & G. S. Head, for which she received a deposit receipt in the usual form. After the death of G. Head, in December, 1890, the business of the bank was carried on by G. S. Head alone. The customer was aware of this fact, and on several subsequent occasions withdrew some of her money—on one of them, viz., the 14th of December, 1891, receiving a fresh deposit note for the balance of 850*l.* in precisely similar terms with the old deposit note, except that the amount due was 850*l.* instead of 1,400*l.* It was argued that there had been a novation, or, in other words, that there had been an agreement on the part of the customer to discharge her

(a) *Harris v. Farwell* (1851), 15 Beav. 31.

(b) (1817), 4 Price, 200.

(c) See also *Daniel v. Cross* (1796), 3 Ves. 276a; *Kirwan v. Kirwan* (1834), 2 Cr. & M. 617; 4 Tyr. 491.

(d) [1893] 3 Ch. 426.

original debtor, G. Head, and accept the liability of G. S. Head alone in substitution for the joint liability of G. & G. S. Head. But Mr. Justice Chitty decided otherwise, saying :—"The giving of a fresh deposit note to a customer who withdraws any part of his deposit seems to have been only a convenient, and very usual, way of writing off a part of the debt due from the bank ; but it is not sufficient evidence of novation to discharge the original debtor from liability. In my opinion there never was any intention on the part of Miss Reynolds to get rid of or discharge her original debtor, and accept the liability of the son alone. The result, therefore, is that her claim to prove against the estate of the deceased partner G. Head for that 850*l.* balance must be allowed."

Cases of Discharge by Agreement.—On the other hand, in *Brown v. Gordon* (e) where a customer had received interest on a deposit for fourteen years after the death of a particular partner, and had proved his claim against the estate of the continuing members of the firm on their bankruptcy, it was held that he had accepted the surviving partners as his debtors, and had no claim against the estate of the deceased member of the firm.

In *Hart v. Alexander* (f) H., an officer serving in the King's forces in India, in 1815, deposited money with A., B., C. and D., bankers in Calcutta, trading under the firm of A. and Co. In 1818 A. came to England, having executed a deed whereby he was to cease to be a partner in the firm in 1822, and E. was to be admitted a partner in his room. In 1822 A. accordingly retired from, and E. came into, the partnership, and the dissolution was announced in the *Calcutta Gazette*. It appeared to be the practice of the firm to give notice of changes of partnership to their customers by circular letters : there was, however, no proof that any letter reached H. announcing A.'s retirement. In 1822 A. became a candidate for a seat in the direction of the East India Company, and repeatedly published an address to the proprietors of East India Stock in several newspapers, stating that his connection with mercantile concerns in India had ceased. Two of these news-

(e) (1852), 16 Beav. 302 ; 22 L. J. Ch. 65.

(f) (1837), 2 M. & W. 484.

papers were taken in at the reading-room of a town where H., who had returned to England, was then resident. The accounts current of A. and Co. were transmitted yearly to H., from 1817 to 1832, and the rates of interest allowed on them varied several times after the year 1822. In 1831 H. executed a power of attorney to the then members of the firm of A. and Co. to collect the effects of a testator in India. In 1832 A. and Co. failed. In 1833 H. executed another power of attorney to C. (who also had then retired from the firm) to prove debts against the estate of the bankrupts (naming them, and describing them as carrying on business under the firm of A. and Co.), and to receive dividends. It was held that these facts constituted sufficient evidence to go to the jury to show that H. knew that A. had retired from the firm and E. had come in in his place; and that he had agreed to discharge A. from liability, and take the new firm as his debtors (g).

In *Bilborough v. Holmes* (h) before April, 1872, a firm of bankers, consisting of A. and B., received money on deposit at interest, for which they gave deposit notes in the usual form to the depositors, who, when the amount on deposit was increased or diminished, gave up their old notes and received fresh ones for the new amount. In April, 1872, X. and Y. were admitted into the partnership, and notice of the change in the firm was given to the depositors. A fortnight afterwards A. died, and the business continued to be carried on under the same firm-name by B., X. and Y. In 1874 B. died, and the business continued to be carried on by X. and Y., still under the same firm-name, until 1875, when the bank stopped payment. The depositors all knew of A.'s death, and none of them made any claim against his estate. Some of them had not altered the amount of their deposits, but retained the notes they had received in his lifetime. They had, however, received interest from X. and Y. Others had increased and others had diminished the amount of their deposits after A.'s death,

(g) Cf. *In re Commercial Bank Corporation of India and the East* (1868), 16 W. R. 958; *Oakeley v. Pasheller* (1836), 4 Cl. & F. 207; *Ex parte Kendall* (1811), 17 Ves. 514, at p. 525; *Winter v. Innes*

(1838), 4 My. & Cr. 101; *Ex parte Butcher, In re Mellor* (1880), 13 Ch. D. 465.

(h) (1876), 5 Ch. D. 255.

receiving fresh deposit notes. They had all proved in the bankruptcy of X. and Y. for the amount due on their notes as money "advanced and lent" to the bankrupts. It was held that in each case there had been a complete novation, and that none of the depositors were entitled to prove against the estate of A.

So, in *In re Head, Head v. Head* (No. 2) (i), a customer of a banking partnership, after the death of one of the partners, went to the surviving partner and said that he wished to draw out 500*l.* from his account (which stood at about 600*l.*), in order to invest it at interest. The surviving partner advised him not to do so, and told him that if he would place it on a deposit account he would pay him interest at 3½ per cent. To this the customer consented, and he was given a deposit receipt in the following form:—

East Grinstead Bank. Deposit receipt. December 24th, 1890.

Received of Mr. A. Tester the sum of 500*l.*

For G. & G. S. HEAD,
G. S. HEAD.

On the same day the sum of 500*l.* was transferred from the claimant's current account to a deposit account. On the following 24th February the bank stopped payment, and G. S. Head was subsequently adjudicated a bankrupt. Between the date of G. Head's death and the stoppage of the bank the claimant drew out of his current account sums amounting to more than 501*l.* 11*s.* 6*d.*, and also paid in various sums, having at the date of the stoppage of the bank overdrawn his current account to the extent of 31*l.* 0*s.* 10*d.* He then sought to prove against the estate of the deceased partner for 479*l.* 3*s.* 6*d.*, being the balance on the current account at the time of his death, less the sum of 22*l.* 8*s.* drawn out between that date and the 24th December, 1890. It was held that the placing of 500*l.* on deposit at the request of the surviving partner constituted a novation, and that accordingly the estate of the deceased partner had been discharged from liability.

"It seems to me," said Lord Justice Lopes, "that this case is

(i) [1894] 2 Ch. 236.

the same as if the customer had drawn a cheque for the 500*l.*, and received the money across the counter, and then gone to the other side of the bank, where the deposit accounts were kept, and opened a deposit account there by depositing the same 500*l.* The treatment of the current account was different altogether from that of the deposit account. While the money was on a current account it was payable on presentation of a cheque, and it carried no interest; when it was placed on deposit it bore interest, and was no longer payable on a cheque, but it was only payable after twenty-one days' notice."

Lord Justice Kay also said:—"In my opinion, by the customer taking the money out of the current account and placing it on deposit, the old liability in respect of it was completely discharged. The whole transaction constituted a new contract with the surviving partner, just as if the money had been taken out and lent to him on his promissory note."

As to Debts of New Firm. 36.—(1.) Where a person deals with a firm after a change in its constitution, he is entitled to treat all apparent members of the old firm as still being members of the firm until he has notice of the change.

(2.) An advertisement in the *London Gazette* as to a firm whose principal place of business is in England or Wales, in the *Edinburgh Gazette* as to a firm whose principal place of business is in Scotland, and in the *Dublin Gazette* as to a firm whose principal place of business is in Ireland, shall be notice as to persons who had not dealings with the firm before the date of the dissolution or change so advertised.

(3.) The estate of a partner who dies, or who becomes bankrupt, or of a partner who, not having been known to the person dealing with the firm to be a partner, retires from the firm, is not liable for partnership debts contracted after the date of the death, bankruptcy, or retirement respectively (*k*).

(*k*) See *Devaynes v. Noble, Streech's Case* (1816), 1 Mer. 539; *Clayton's Case* (1816), 1 Mer. 572; *Brice's Case* (1816), 1 Mer. 620; *Houlton's Case* (1816), 1 Mer. 616; *Friend v. Young*, [1897] 2 Ch. 421, at pp. 427, 428.

Dissolution.

The dissolution of partnership is regulated as follows :—

Expiration of Term and Notice. 32. Subject to any agreement between the partners, a partnership is dissolved—

- (a) If entered into for a fixed term, by the expiration of that term :
- (b) If entered into for a single adventure or undertaking, by the termination of that adventure or undertaking (1) :
- (c) If entered into for an undefined time, by any partner giving notice to the other or others of his intention to dissolve the partnership.

In the last-mentioned case the partnership is dissolved as from the date mentioned in the notice as the date of dissolution, or, if no date is so mentioned, as from the date of the communication of the notice.

Bankruptcy, Death, or Charge. 33.—(1.) Subject to any agreement between the partners, every partnership is dissolved as regards all the partners by the death or bankruptcy of any partner.

(2.) A partnership may, at the option of the other partners, be dissolved if any partner suffers his share of the partnership property to be charged under this Act for his separate debt.

Illegality. 34. A partnership is in every case dissolved by the happening of any event which makes it unlawful for the business of the firm to be carried on, or for the members of the firm to carry it on in partnership.

Dissolution by the Court. 35. On application by a partner the Court may decree a dissolution of the partnership in any of the following cases :—

- (a) When a partner is found lunatic by inquisition, or in Scotland by cognition, or is shown to the satisfaction of the Court to be of permanently unsound mind, in either of which cases the application may be made as well on behalf of that partner by his committee, or next friend, or person having title to intervene, as by any other partner :
- (b) When a partner, other than the partner suing, becomes

(1) This clause can have no application to a banking partnership.

in any other way permanently incapable of performing his part of the partnership contract :

- (c) When a partner, other than the partner suing, has been guilty of such conduct as, in the opinion of the Court, regard being had to the nature of the business, is calculated to prejudicially affect the carrying on of the business :
- (d) When a partner, other than the partner suing, wilfully or persistently commits a breach of the partnership agreement, or otherwise so conducts himself in matters relating to the partnership business that it is not reasonably practicable for the other partner or partners to carry on the business in partnership with him :
- (e) When the business of the partnership can only be carried on at a loss :
- (f) Whenever in any case circumstances have arisen which, in the opinion of the Court, render it just and equitable that the partnership be dissolved.

Continuing Rights and Obligations. 38. After the dissolution of a partnership the authority of each partner to bind the firm, and the other rights and obligations of the partners, continue notwithstanding the dissolution, so far as may be necessary to wind up the affairs of the partnership, and to complete transactions begun but unfinished at the time of the dissolution, but not otherwise.

Provided that the firm is in no case bound by the acts of a partner who has become bankrupt ; but this proviso does not affect the liability of any person who has after the bankruptcy represented himself or knowingly suffered himself to be represented as a partner of the bankrupt (*m*).

Bankruptcy.

Acts of Bankruptcy.—A debtor commits an act of bankruptcy in each of the following cases (*n*):—

- (a) If in England or elsewhere he makes a conveyance or

(*m*) See *Butchart v. Dresser* (1853), 10 Hare, 453 ; and, on appeal, 4 De G. M. & G. 542.

(*n*) All these acts are enumerated in

the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 4, with the exception of (e), which, in its present form, was defined by sect. 1 of the Bankruptcy Act, 1890 (53 & 54 Vict. c. 71).

assignment of his property to a trustee or trustees for the benefit of his creditors generally :

- (b) If in England or elsewhere he makes a fraudulent conveyance, gift, delivery, or transfer of his property, or of any part thereof :
- (c) If in England or elsewhere he makes any conveyance or transfer of his property or any part thereof, or creates any charge thereon which would under this or any other Act be void as a fraudulent preference if he were adjudged bankrupt :
- (d) If with intent to defeat or delay his creditors he does any of the following things, namely, departs out of England, or being out of England remains out of England, or departs from his dwelling-house, or otherwise absents himself, or begins to keep house :
- (e) If execution against him has been levied by seizure of his goods under process in an action in any Court, or in any civil proceeding in the High Court, and the goods have been either sold or held by the sheriff for twenty-one days :

Provided that, where an interpleader summons has been taken out in regard to the goods seized, the time elapsing between the date at which such summons is taken out and the date at which the sheriff is ordered to withdraw, or any interpleader issue ordered thereon is finally disposed of, shall not be taken into account in calculating such period of twenty-one days :

- (f) If he files in the Court a declaration of his inability to pay his debts, or presents a bankruptcy petition against himself :
- (g) If a creditor has obtained a final judgment against him for any amount (o), and execution thereon not having been stayed, has served on him in England, or, by leave of the Court, elsewhere, a bankruptcy notice

(o) Any person who is for the time being entitled to enforce a final judgment is to be deemed such a creditor : Bankruptcy Act, 1890, s. 1.

under this Act, requiring him to pay the judgment debt in accordance with the terms of the judgment, or to secure or compound for it to the satisfaction of the creditor or the Court, and he does not, within seven days after service of the notice, in case the service is effected in England, and in case the service is effected elsewhere, then within the time limited in that behalf by the order giving leave to effect the service, either comply with the requirements of the notice, or satisfy the Court that he has a counter-claim, set-off or cross demand which equals or exceeds the amount of the judgment debt, and which he could not set up in the action in which the judgment was obtained:

- (h) If the debtor gives notice to any of his creditors that he has suspended, or that he is about to suspend, payment of his debts (*p*).

Bankers who, finding themselves insolvent, caused the door and shutters of their banking-house to be kept shut during banking hours, notwithstanding that persons were clamouring outside, were held to have begun to keep house (*q*), although they did not reside there (*r*).

A banker might be made a bankrupt (under the old law) though not keeping an open shop (*s*).

An act of bankruptcy committed by one of the partners will not in itself amount to an act of bankruptcy on the part of the firm (*t*).

The members of the firm can be jointly adjudicated bankrupt if some act of bankruptcy has been committed by each of them (*u*), or they have concurred in a joint act of bankruptcy (*u*).

(*p*) See also sect. 103 (5) of the Bankruptcy Act, 1883.

(*q*) Within the meaning of 6 Geo. 4, c. 16, s. 3.

(*r*) *Cunning v. Baily* (1830), 6 Bing. 363.

(*s*) *Ex parte Wilson* (1752), 1 Atk.

218.

(*t*) *Ex parte Blain, In re Sawers* (1879), 12 Ch. D. 522.

(*u*) *Beasley v. Beasley* (1736), 1 Atk. 97; *Mills v. Bennett* (1814), 2 M. & S. 556; *Dutton v. Morrison* (1810), 17 Ves. 193 (this case was distinguished in

In *Mills v. Bennett* (*x*) one of three partners in a banking concern, who resided at the place where the banking-house was, and was the only partner who transacted the business, the other two residing at a distance from it, absented himself from the banking-house, shut it up, and stopped payment. It was held that this was not evidence of a joint act of bankruptcy by all three (*y*).

A debt owing by the firm is, of course, sufficient to support an adjudication of bankruptcy against all the members (*z*).

Ex parte Egyptian Commercial and Trading Co., In re Kelson (1868), 4 Ch. 125).

(*x*) See last note.

(*y*) See also *Ex parte Blain, In re Savers* (1879), 12 Ch. D. 522.

(*z*) Bankruptcy Act, 1883, s. 110.

CHAPTER III.

REGISTERED BANKING COMPANIES.

ANY number of persons exceeding six may form themselves into an incorporated company for the carrying on of the business of banking, either with limited or with unlimited liability, by registering a memorandum of association under the Companies Acts, 1862 to 1900 (*a*).

Any existing banking company of more than six members may register under these Acts either with or without limited liability, subject to the qualification that a company having the liability of its members limited by Act of Parliament or letters patent cannot register as a company with liability limited by shares (*b*).

No company, association, or partnership consisting of more than ten persons may be formed for the purpose of carrying on the business of banking unless it is registered as a company under the Companies Acts, or is formed in pursuance of a special Act of Parliament or of letters patent (*c*).

Banking companies registered under the earlier Joint Stock Companies Acts are now in the position of companies formed under the Companies Acts, subject to certain qualifications contained in the Companies Act, 1862 (*d*).

Of the banking companies now registered under the Companies Acts some were originally formed under these Acts; others were formed before the 6th May, 1844, and in accordance with the statutes then in operation (*e*); others under 7 & 8 Vict. c. 113; and

(*a*) Companies Act, 1862 (25 & 26 Vict. c. 89), s. 6.

(*b*) *Ibid.* ss. 6, 179.

(*c*) *Ibid.* s. 4.

(*d*) Sects. 176—178, 196.

(*e*) 7 Geo. 4, c. 46; 3 & 4 Will. 4, c. 98.

the remainder under the Joint Stock Companies Acts, 1857 and 1858.

Limited Liability.

As to the registration of an existing banking company as limited, the Companies Act, 1862, provided as follows :—

188. Every banking company existing at the date of the passing of this Act which registers itself as a limited company shall, at least thirty days previous to obtaining a certificate of registration with limited liability, give notice that it is intended so to register the same to every person and partnership firm who have a banking account with the company, and such notice shall be given either by delivering the same to such person or firm, or leaving the same or putting the same into the post addressed to him or them at such address as shall have been last communicated or otherwise become known as his or their address to or by the company; and in case the company omits to give any such notice as is hereinbefore required to be given, then as between the company and the person or persons only who are for the time being interested in the account in respect of which such notice ought to have been given, and so far as respects such account and all variations thereof down to the time at which such notice shall be given, but not further or otherwise, the certificate of registration with limited liability shall have no operation.

A banking company registered with unlimited liability may re-register with limited liability. This is provided by the Companies Act, 1879 (42 & 43 Vict. c. 76), as follows :—

4. Subject as in this Act mentioned, any company registered before or after the passing of this Act as an unlimited company may register under the Companies Acts, 1862 to 1879, as a limited company, or any company already registered as a limited company may re-register under the provisions of this Act.

The registration of an unlimited company as a limited company in pursuance of this Act shall not affect or prejudice any debts, liabilities, obligations, or contracts incurred or entered into, by, to, with, or on behalf of such company prior to registration, and such debts, liabilities, contracts, and obligations may be enforced in manner provided by Part VII. of the

Companies Act, 1862, in the case of a company registering in pursuance of that part.

5. An unlimited company may, by the resolution passed by the members when assenting to registration as a limited company under the Companies Acts, 1862 to 1879, and for the purpose of such registration or otherwise, increase the nominal amount of its capital by increasing the nominal amount of each of its shares.

Provided always, that no part of such increased capital shall be capable of being called up, except in the event of and for the purposes of the company being wound up.

And, in cases where no such increase of nominal capital may be resolved upon, an unlimited company may, by such resolution as aforesaid, provide that a portion of its uncalled capital shall not be capable of being called up, except in the event of and for the purposes of the company being wound up.

A limited company may by a special resolution declare that any portion of its capital which has not been already called up shall not be capable of being called up, except in the event of and for the purpose of the company being wound up; and thereupon such portion of capital shall not be capable of being called up, except in the event of and for the purposes of the company being wound up (*f*).

10. A company authorised to register under this Act may register thereunder and avail itself of the privileges conferred by this Act, notwithstanding any provisions contained in any Act of Parliament, royal charter, deed of settlement, contract of copartnery, cost book, regulations, letters patent, or other instrument constituting or regulating the company (*g*).

The statutory requirements as to the affixing and use of its name by a limited company are dealt with in Chapter 7 of this Part.

Liability upon Notes.

The Companies Act, 1879, provides as follows:—

6. A bank of issue registered as a limited company, either before or after the passing of this Act, shall not be entitled to limited liability in respect of its notes; and the members thereof shall

(*f*) See also sect. 9.

(*g*) This Act does not apply to the Bank of England: sect. 2.

continue liable in respect of its notes in the same manner as if it had been registered as an unlimited company; but in case the general assets of the company are, in the event of the company being wound up, insufficient to satisfy the claims of both the note-holders and the general creditors, then the members, after satisfying the remaining demands of the note-holders, shall be liable to contribute towards payment of the debts of the general creditors a sum equal to the amount received by the note-holders out of the general assets of the company.

For the purposes of this section, the expression "the general assets of the company" means the funds available for payment of the general creditor as well as the note-holder.

It shall be lawful for any bank of issue registered as a limited company to make a statement on its notes to the effect that the limited liability does not extend to its notes, and that the members of the company continue liable in respect of its notes in the same manner as if it had been registered as an unlimited company.

Annual List and Summary.

The Companies Act, 1862, provides :—

26. Every company under this Act, and having a capital divided into shares, shall make, once at least in every year, a list of all persons who, on the fourteenth day succeeding the day on which the ordinary general meeting, or, if there is more than one ordinary meeting in each year, the first of such ordinary general meetings is held, are members of the company; and such list shall state the names, addresses, and occupations of all the members therein mentioned, and the number of shares held by each of them, and shall contain a summary specifying the following particulars :—

- (1.) The amount of the capital of the company, and the number of shares into which it is divided.
- (2.) The number of shares taken from the commencement of the company up to the date of the summary.
- (3.) The amount of calls made on each share.
- (4.) The total amount of calls received.
- (5.) The total amount of calls unpaid.
- (6.) The total amount of shares forfeited.
- (7.) The names, addresses, and occupations of the persons who have ceased to be members since the last list was made, and the number of shares held by each of them.

The above list and summary shall be contained in a separate part of the register, and shall be completed within seven days after such fourteenth day as is mentioned in this section, and a copy shall forthwith be forwarded to the registrar of joint stock companies (*h*).

The Companies Act, 1900 (*i*), provides:—

19.—(1.) The summary mentioned in section twenty-six of the Companies Act, 1862, shall be so framed as to distinguish between the shares issued for cash and the shares issued otherwise than for cash, or only partly for cash, and shall, in addition to the particulars required by that section to be specified, also specify—

- (a) the total amount of debt due from the company in respect of all mortgages and charges which require registration under this Act, or which would require such registration if created after the commencement of this Act; and
 - (b) The names and addresses of the persons who are the directors of the company at the date of the summary.
- (2.) The list and summary mentioned in the said section twenty-six must be signed by the manager or by the secretary of the company.

A banking company must add to the list and summary a statement of the names of the several places where it carries on business. No further return is necessary under the earlier Acts (*k*).

It is no longer obligatory upon the Commissioners of Inland Revenue to publish in any newspaper any return made to them by any banking company registered under the Companies Acts (*l*).

Inspection of Register.

The Companies Act, 1862, provides—

32. The register of members, commencing from the date of the registration of the company, shall be kept at the registered office of the company hereinafter mentioned. Except when closed as hereinafter mentioned, it shall during business hours,

(*h*) See also sect. 27.—As to what constitutes default under these sections, see *Dorté v. South African Super-Aëration, Limited* (1904), 20 T. L. R. 425.

(*i*) 63 & 64 Vict. c. 48.

(*k*) 45 & 46 Vict. c. 72, s. 11 (1).

(*l*) 43 & 44 Vict. c. 20, s. 57.

but subject to such reasonable restrictions as the company in general meeting may impose, so that not less than two hours in each day be appointed for inspection, be open to the inspection of any member gratis, and to the inspection of any other person on the payment of one shilling, or such less sum as the company may prescribe, for each inspection; and every such member or other person may require a copy of such register, or of any part thereof, or of such list or summary of members as is hereinbefore mentioned, on payment of sixpence for every hundred words required to be copied. If such inspection or copy is refused, the company shall incur for each refusal a penalty not exceeding two pounds, and a further penalty not exceeding two pounds for every day during which such refusal continues, and every director and manager of the company who shall knowingly authorise or permit such refusal shall incur the like penalty; and in addition to the above penalty, as respects companies registered in England and Ireland, any judge sitting in chambers^(m) may by order compel an immediate inspection of the register.

It is further provided by the 30 Vict. c. 29—

2. Joint stock banking companies shall be bound to show their list of shareholders to any registered shareholder during business hours from ten of the clock to four of the clock.

Statement of Capital and Liabilities.

The Companies Act, 1862, provides—

44. Every limited banking company and every insurance company, and deposit, provident, or benefit society under this Act, shall, before it commences business, and also on the first Monday in February and the first Monday in August in every year during which it carries on business, make a statement in the form marked D. in the first schedule hereto, or as near thereto as circumstances will admit, and a copy of such statement shall be put up in a conspicuous place in the registered office of the company, and in every branch office or place where the business of the company is carried on, and if default is

^(m) Or a County Court in the case of companies subject to the jurisdiction formerly exercised by the Stannaries Court: see the omitted words of the

above section, and the Order transferring the jurisdiction, W. N. (1897) Misc. 43.

made in compliance with the provisions of this section the company shall be liable to a penalty not exceeding five pounds for every day during which such default continues, and every director and manager of the company who shall knowingly and wilfully authorise or permit such default shall incur the like penalty.

Every member and every creditor of any company mentioned in this section shall be entitled to a copy of the above-mentioned statement on payment of a sum not exceeding sixpence.

FORM (D.) OF STATEMENT REFERRED TO IN THE FOREGOING SECTION.

(n) The capital of the company is , divided into shares of each. The number of shares issued is .

Calls to the amount of pounds per share have been made, under which the sum of pounds has been received.

The liabilities of the company on the first day of January (or July) were—

Debts owing to sundry persons by the company :

On judgment	£
On specialty	£
On notes or bills	£
On simple contract	£
On estimated liabilities	£

The assets of the company on that day were :

Government securities [stating them] ..	£
Bills of exchange and promissory notes ..	£
Cash at the bankers	£
Other securities	£

Audit of Accounts.

The Companies Act, 1879, provides as follows:—

7.—(1.) Once at the least in every year the accounts of every banking company registered after the passing of this Act as a limited company shall be examined by an auditor or auditors, who shall be elected annually by the company in general meeting.

(n) If the company has no capital statement relating to capital and shares divided into shares, the portion of the must be omitted.

(2.) A director or officer of the company shall not be capable of being elected auditor of such company.

(3.) An auditor on quitting office shall be re-eligible.

(4.) If any casual vacancy occurs in the office of any auditor, the surviving auditor or auditors (if any) may act, but if there is no surviving auditor, the directors shall forthwith call an extraordinary general meeting for the purpose of supplying the vacancy or vacancies in the auditorship.

(5.) Every auditor shall have a list delivered to him of all books kept by the company, and shall at all reasonable times have access to the books and accounts of the company; and any auditor may, in relation to such books and accounts, examine the directors or any other officer of the company: Provided that if a banking company has branch banks beyond the limits of Europe, it shall be sufficient if the auditor is allowed access to such copies of and extracts from the books and accounts of any such branch as may have been transmitted to the head office of the banking company in the United Kingdom.

(6.) The auditor or auditors shall make a report to the members on the accounts examined by him or them, and on every balance-sheet laid before the company in general meeting during his or their tenure of office; and in every such report shall state whether, in his or their opinion, the balance-sheet referred to in the report is a full and fair balance-sheet properly drawn up, so as to exhibit a true and correct view of the state of the company's affairs, as shown by the books of the company; and such report shall be read before the company in general meeting.

(7.) The remuneration of the auditor or auditors shall be fixed by the general meeting appointing such auditor or auditors, and shall be paid by the company.

8. Every balance-sheet submitted to the annual or other meeting of the members of every banking company registered after the passing of this Act as a limited company shall be signed by the auditor or auditors, and by the secretary or manager (if any), and by the directors of the company, or three of such directors at the least.

The above provisions are apparently still operative, notwithstanding the similar provisions made by the Companies Act, 1900, for the audit of the accounts of all companies registered under the

Companies Acts. They are, however, supplemented by the following provisions of the later Act (o) :—

21.—(2.) If an appointment of auditors is not made at an annual general meeting, the Board of Trade may, on the application of any member of the company, appoint an auditor of the company for the current year, and fix the remuneration to be paid to him by the company for his services.

23. . . . The auditors shall sign a certificate at the foot of the balance-sheet stating whether or not all their requirements as auditors have been complied with. . . .

Examination of Affairs.

In the case of a banking company with a capital divided into shares, upon the application of members holding not less than one third part of the shares for the time being issued, the Board of Trade may appoint one or more competent inspectors to examine into the affairs of the company and to report thereon in such manner as the Board may direct. The application must be supported by such evidence as the Board may require for the purpose of showing that the applicants have good reason for requiring such investigation to be made, and that they are not actuated by malicious motives in instituting the same. The applicants may also be required to give security for payment of the costs of the inquiry (p).

All officers and agents of the company must produce for the examination of the inspectors all books and documents in their custody or power. Any inspector may examine upon oath the officers and agents of the company in relation to its business. If any officer or agent refuses to produce any book or document hereby directed to be produced, or to answer any question relating to the affairs of the company, he incurs a penalty not exceeding 5*l.* in respect of each offence (q).

Moreover, a banking company, like any other company registered under the Companies Acts, may by special resolution appoint

(o) See Lindley on Companies, 6th ed.
p. 623.

(p) Companies Act, 1862, ss. 56, 57.
(q) *Ibid.* s. 58. See also sects. 59, 61.

inspectors for the purpose of examining into the affairs of the company, who shall have the same powers and perform the same duties as inspectors appointed by the Board of Trade, except that they must make their report in such manner and to such persons as the company in general meeting directs (*r*).

Contracts.

The Companies Act, 1867 (30 & 31 Vict. c. 131), provides—

37. Contracts on behalf of any company under the principal Act may be made as follows; (that is to say,)

- (1.) Any contract which, if made between private persons, would be by law required to be in writing, and if made according to English law to be under seal, may be made on behalf of the company in writing under the common seal of the company, and such contract may be in the same manner varied or discharged.
- (2.) Any contract which, if made between private persons, would be by law required to be in writing, and signed by the parties to be charged therewith, may be made on behalf of the company in writing signed by any person acting under the express or implied authority of the company, and such contract may in the same manner be varied or discharged.
- (3.) Any contract which, if made between private persons, would by law be valid although made by parol only, and not reduced into writing, may be made by parol on behalf of the company by any person acting under the express or implied authority of the company, and such contract may in the same way be varied or discharged.

And all contracts made according to the provisions herein contained shall be effectual in law, and shall be binding upon the company and their successors and all other parties thereto, their heirs, executors or administrators, as the case may be (*s*).

(*r*) Companies Act, 1862, s. 60. See also sect. 61.

91, 97. See also sects. 42 and 47 of the Companies Act, 1862, cited in Chap. 7 of this Part.

Shares.

Legal Character.—Shares in companies registered under the Companies Act are personal estate (*t*). They are not interests in land within the meaning of the Mortmain Acts (*u*), or of the 4th section of the Statute of Frauds (*v*). Nor are they goods or chattels within the meaning of the 17th section of the latter statute (*x*). But they are goods within the meaning of Ord. L. r. 2 (as to the power of the Court to order a sale of goods in dispute (*y*)), and of Ord. LVII. (as to interpleader proceedings (*z*)), of the Rules of the Supreme Court.

Where shares are held by two or more persons jointly and one dies, the legal title survives to the other or others (*a*).

Sales.—The 30 Vict. c. 29, known as Leeman's Act, provides as follows:—

1. All contracts, agreements, and tokens of sale and purchase which shall be made or entered into for the sale or transfer, or purporting to be for the sale or transfer, of any share or shares, or of any stock or other interest, in any joint stock banking company in the United Kingdom of Great Britain and Ireland constituted under or regulated by the provisions of any Act of Parliament, royal charter, or letters patent, issuing shares or stock transferable by any deed or written instrument, shall be null and void to all intents and purposes whatsoever, unless such contract, agreement, or other token shall set forth and designate in writing such shares, stock, or interest by the respective numbers by which the same are distinguished at the making of such contract, agreement, or token on the register or books of such banking company as aforesaid, or where there is no such register of shares or stock by distinguishing numbers, then unless such contract, agreement, or other token shall set

(*t*) Companies Act, 1862, s. 22.

(*u*) *Myers v. Perigal* (1851), 11 C. B. 90; 2 De G. M. & G. 599; *Edwards v. Hall* (1855), 6 De G. M. & G. 74. Cf. *Ashworth v. Munn* (1880), 15 Ch. D. 363, at pp. 368, 372, 375, 376.

(*v*) *Humble v. Mitchell* (1839), 11 A. & E. 205; Companies Act, 1862, s. 22.

(*x*) *Humble v. Mitchell*, see last note.

(*y*) *Evans v. Davies*, [1893] 2 Ch. 216.

(*z*) *Robinson v. Jenkins* (1890), 24 Q. B. D. 275.

(*a*) *Hill's Case* (1875), 20 Eq. 595; *Garrick v. Taylor* (1861), 31 L. J. Ch. 68; 4 De G. F. & J. 159. See also *Hobbs v. Wayet* (1887), 36 Ch. D. 256.

forth the person or persons in whose name or names such shares, stock, or interest shall at the time of making such contract stand as the registered proprietor thereof in the books of such banking company; and every person, whether principal, broker, or agent, who shall wilfully insert in any such contract, agreement, or other token any false entry of such numbers, or any name or names other than that of the person or persons in whose name such shares, stock, or interest shall stand as aforesaid, shall be guilty of a misdemeanour, and be punished accordingly, and, if in Scotland, shall be guilty of an offence punishable by fine or imprisonment.

This Act does not apply to shares or stock in the Bank of England or the Bank of Ireland (*b*).

By the Rules of the Stock Exchange members are compelled to perform contracts for the sale of bank shares which do not comply with the above provisions; and in practice the Act is very commonly disregarded by them. If a person who is cognisant of this employs a member of the Exchange to buy or sell such shares, he will in effect be bound to carry out the bargain (*c*). But, in the absence of such knowledge on the part of the employer, a stockbroker authorized to purchase such shares cannot recover from him the price which he has been obliged by the rules of the Exchange to pay for them, if the employer repudiates the contract (*d*). And a stockbroker employed to sell may be liable to his employer if the contract of sale is repudiated by the other party owing to the failure to comply with the Act (*e*).

Transfer.—The directors of a company are entitled to a reasonable time for the consideration of every transfer before they register it, although they may not be expressly empowered in this behalf by the articles of association (*f*).

Where, by the regulations of the company, the consent of the

(*b*) Sect. 3.

(*d*) *Perry v. Barnett* (1885), 15 Q. B. D. 388.

(*c*) *Seymour v. Bridge* (1885), 14 Q. B. D. 460. Cf. *Loring v. Davis* (1886), 32

(*e*) *Neilson v. James* (1882), 9 Q. B. D. 546.

Ch. D. 625; *Nelson Mitchell v. City of Glasgow Bank* (1879), 4 A. C. 624.

(*f*) *In re Ottos Kopje Diamond Mines, Limited*, [1893] 1 Ch. 618.

directors is necessary to a transfer, they cannot withhold their consent capriciously and without good reason.

In *Robinson v. Chartered Bank* (g) it appeared that, by the deed of settlement of a banking company, it was declared that no person should be entitled to become a transferee of a share unless he was approved by the court of directors. It was held that the directors must exercise their power reasonably. The question whether it is a reasonable ground of objection that the proposed transferee is the nominee of a rival bank with which the shares have been deposited as security was left open for further consideration.

Lien.—A lien may be effectually conferred upon a company by its articles of association on all shares registered in the name of any member for his debts to the company, so that the member's title to transfer the same, while he remains indebted, will be dependent on the approval of the directors (h).

In *In re General Exchange Bank*, *In re Lewis* (i), by the articles of association the bank had a lien on the shares for all moneys due by shareholders. The bank was wound up, and the assets were sold, one of the terms being that certain shareholders in the bank should be paid 2*l.* a share. It was held that the bank had, on the money so to be paid to a shareholder, a lien for moneys due by him to the bank.

In *Hague v. Dandeson* (k) the deed of settlement of a banking co-partnership provided that the directors should have a lien on the shares and stock of every shareholder for debts due from him to the company, and that the directors might cancel and declare forfeited or sell the shares of such shareholders, or otherwise deal with the same as the case might require, for obtaining payment of such debts. It was held that the bank had a lien, not only on the

(g) (1865), 1 Eq. 32. Cf. *In re Gresham Life Assurance Society*, *Ex parte Penney* (1872), 8 Ch. 446; and see also *In re Coalport China Co.*, [1895] 2 Ch. 404; *Slee v. International Bank* (1868), 17 L. T. 425 (which was a case of amalgamation).

(h) *Bank of Africa v. Salisbury Gold Mining Co.*, [1892] A. C. 281; *Bradford Banking Co. v. Briggs* (1886), 12 A. C. 29. Cf. *In re Cawley & Co.* (1889), 42 Ch. D. 209.

(i) (1871), 6 Ch. 818.

(k) (1848), 2 Ex. 741.

shares, but also on the dividends of a shareholder who had overdrawn his account.

Referring to the terms of the deed, Baron Parke said:—"That is sufficient to give a lien, not merely on the shares, so as to transfer them at the market price, but if, instead of selling the shares, which might be an injury to the property, they choose to work out the debt by means of the dividends, it is competent for them to do so; and in that case they have the power of retaining the dividends in order to satisfy the arrears due from the customer."

A lien upon the shares of any shareholder "for all moneys due to the company from him" will extend to the case of bills of exchange given for a debt due to the bank before they arrive at maturity. Although their amount cannot be recovered for the time being, the lien of the bank will have priority over a charge created on the shares by the shareholder before the bills mature (*l*).

In *New London and Brazilian Bank v. Brocklebank (m)* the trustees of a marriage settlement, which authorized them to invest in the shares of any trading company, invested part of their trust funds in the purchase of shares in a limited banking company, which were transferred into their joint names. By the articles it was provided that the company should have a first and paramount charge on the shares of any shareholder for all moneys owing to the company from him alone, or jointly with any other person, and that when a share was held by more persons than one the company should have a like lien and charge thereon in respect of all moneys so owing to them from all or any of the holders thereof alone, or jointly with any other person. One of the trustees was a partner in a firm which afterwards went into liquidation, at which time it owed the company a debt which had arisen long after the registration of the shares in the names of the trustees. It was held that the bank had a lien on the shares for this debt which must prevail over the title of the *cestuis que trustent*. Whether, as between

(*l*) *In re London, Birmingham, &c. Banking Co.* (1865), 34 Beav. 332; 34 L. J. Ch. 418; 12 L. T. 45; 13 W. R. 446.

(*m*) (1882), 21 Ch. D. 302.

themselves and the *cestuis que trust*, the trustees were authorized to make such an investment it was unnecessary to decide (*n*).

In *In re Collie, Ex parte Manchester and County Bank* (*o*), by the articles of association of a joint stock bank, it was provided that the shares of every shareholder should be always subject to a lien thereon in favour of the bank for all moneys from time to time due from him to the bank in respect of any call, or as a debt or liability to the bank from him, alone or jointly with any other person. At the commencement of the bankruptcy of two partners some shares in the bank stood in the name of A., one of the two. The shares were, in fact, partnership property, though the bank did not know that anyone but A. was interested in them. The partners owed the bank a large debt for moneys advanced to them. The whole of this debt had been contracted since the shares (which were originally the property of A. alone) had become partnership property. It was held that the bank's security was on the joint estate, and that they could only prove against that estate for the balance of their debt after deducting the value of the shares.

Winding-up.

The Companies Act, 1862, provides as follows :—

Compulsory Winding-up. 79. A company under this Act may be wound up by the Court, as hereinafter defined (*p*), under the following circumstances; (that is to say,)

- (1.) Whenever the company has passed a special resolution requiring the company to be wound up by the Court.
- (2.) Whenever the company does not commence its business within a year from its incorporation (*q*), or, suspends its business for the space of a whole year.
- (3.) Whenever the members are reduced in number to less than seven.
- (4.) Whenever the company is unable to pay its debts.

(*n*) Cf. *Bradford Banking Co. v. Briggs* (1886), 12 A. C. 29; *Rearden v. Provincial Bank*, [1896] 1 Ir. Rep. 532.

(*o*) (1876), 3 Ch. D. 481; 45 L. J. Bank. 149.

(*p*) See also sect. 81, and Companies (Winding-up) Act, 1890 (53 & 54 Vict. c. 63), ss. 1, 32 (2).

(*q*) See also Companies Act, 1900, s. 6.

- (5.) Whenever the Court is of opinion that it is just and equitable that the company should be wound up (*r*).

80. A company under this Act shall be deemed to be unable to pay its debts—

- (1.) Whenever a creditor, by assignment or otherwise, to whom the company is indebted, at law or in equity, in a sum exceeding fifty pounds then due, has served on the company, by leaving the same at their registered office, a demand under his hand requiring the company to pay the sum so due, and the company has, for the space of three weeks succeeding the service of such demand, neglected to pay such sum, or to secure or compound for the same to the reasonable satisfaction of the creditor.
- (2.) Whenever, in England and Ireland, execution or other process issued on a judgment, decree, or order obtained by any Court in favour of any creditor, at law or in equity, in any proceeding instituted by such creditor against the company, is returned unsatisfied, in whole or in part.
- (3.) Whenever, in Scotland, the induciae of a charge for payment on an extract decree, or an extract registered bond, or an extract registered protest, have expired without payment being made.
- (4.) Whenever it is proved to the satisfaction of the Court that the company is unable to pay its debts (*s*).

Voluntary Winding-up. 129. A company under this Act may be wound up voluntarily—

- (1.) Whenever the period, if any, fixed for the duration of the company by the articles of association expires, or whenever the event, if any, occurs, upon the occurrence of which it is provided by the articles of association that the company is to be dissolved, and the company in general meeting has passed a resolution requiring the company to be wound up voluntarily.
- (2.) Whenever the company has passed a special resolution requiring the company to be wound up voluntarily.
- (3.) Whenever the company has passed an extraordinary resolution to the effect that it has been proved to their satisfaction that the company cannot by reason of its liabilities continue its business, and that it is advisable to wind up the same.

(*r*) See also Companies Act, 1900, s. 12 (8).

(*s*) See also sect. 199 (4).

For the purposes of this Act any resolution shall be deemed to be extraordinary which is passed in such manner as would, if it had been confirmed by a subsequent meeting, have constituted a special resolution, as hereinbefore defined (*t*).

Winding-up subject to Supervision. 147. When a resolution has been passed by a company to wind up voluntarily, the Court may make an order directing that the voluntary winding-up should continue, but subject to such supervision of the Court, and with such liberty for creditors, contributories, or others, to apply to the Court, and generally upon such terms and subject to such conditions as the Court thinks just (*u*).

The Companies (Winding-up) Act, 1890, provides—

14. Where a company is being wound up voluntarily or subject to the supervision of the Court, the official receiver attached to the Court having jurisdiction to wind up the company may present a petition that the company be wound up by the Court, and thereupon, if the Court is satisfied that the voluntary winding-up or winding-up subject to supervision cannot be continued with due regard to the interests of the creditors or contributories, it may make an order that the company be wound up by the Court.

Actions against Company.—After a winding-up order has been made, no action or other legal proceeding may be commenced or prosecuted against the company except by leave of the Court, and subject to such terms as it may impose (*x*).

Where a person has been induced to become a shareholder by fraud or misrepresentation, it is too late for him to rescind his contract after winding-up proceedings have commenced (*y*). Nor can an action for damages for misrepresentation, whereby the plaintiff was induced to take shares, be maintained against the liquidators of a company after its winding-up has commenced (*z*).

(*t*) See also sect. 138 of this Act, and the Companies Act, 1900, s. 24.

(*u*) As to the winding-up of unregistered companies, see sects. 199—204.

(*x*) Companies Act, 1862, s. 87. See also sects. 138, 148, 163, 198, 202; Companies Act, 1900, s. 25.

(*y*) *Oakes v. Turquand* (1867), L. R. 2

E. & I. A. 325; *Stone v. City and County Bank* (1877), 3 C. P. D. 282; *Tennent v. Glasgow Bank* (1879), 4 A. C. 615; *Cree v. Somervail* (1879), 4 A. C. 648; *In re Hull & County Bank, Burgess's Case* (1880), 15 Ch. D. 507.

(*z*) *Houldsworth v. City of Glasgow Bank* (1880), 5 A. C. 317.—As to mis-

Inspection of Books.

The Companies Act, 1862, provides—

156. Where an order has been made for winding-up a company by the Court or subject to the supervision of the Court, the Court may make such order for the inspection by the creditors and contributories of the company of its books and papers as the Court thinks just, and any books and papers in the possession of the company may be inspected by creditors or contributories in conformity with the order of the Court, but not further or otherwise.

An order may be made under this section notwithstanding a secrecy clause in the articles of association. But a shareholder inspecting may be restrained from divulging information so acquired (*a*). Moreover, if the winding-up is for the purpose of reconstruction, an inspection which would be likely to prejudice the new company, and which is unnecessary, will not be ordered (*b*).

Amalgamation.

An amalgamation takes place when two companies are so joined as to form a third entity (*c*).

The word “amalgamation,” however, has not acquired a technical or well-defined legal meaning (*d*).

Contracts with Companies Amalgamated.—Whether the new company has been substituted for one of the old companies as a party to a contract with a customer will be a question of fact.

representations made by a manager with the authority of the directors of a company entitling a shareholder to rescind his contract to take shares, see *Western Bank of Scotland v. Addie* (1867), 1 H. L. Sc. 145 (distinguished in *Mackay v. Commercial Bank of New Brunswick* (1874), L. R. 5 P. C. 394).

(*a*) *In re Birmingham Banking Co., Ex parte Brinsley* (1866), 36 L. J. Ch. 150.

(*b*) *In re Glamorganshire Banking Co., Morgan's Case* (1884), 28 Ch. D. 620.

(*c*) Buckley on the Companies Acts, 8th ed. p. 446. Cf. per Davey, L. J., in *New Zealand Gold, &c. Co. v. Peacock*, [1894] 1 Q. B. 622, at p. 632.

(*d*) Per Lord Hatherley in *In re Empire Assurance Corporation* (1867), 4 Eq. 341, at p. 347; per Kennedy, J., in *New Zealand Gold, &c. Co. v. Peacock*, [1894] 1 Q. B. 622, at p. 627.

The subject of novation has been already discussed in connection with changes in firms on pages 13 to 18. In the main, the same principles apply in the present case; but it may be that somewhat stronger evidence will be necessary to prove a novation in the case of an amalgamation of companies (e).

“Although the rights under the new contract be altered to the detriment of the creditor, and to the advantage of the new company with respect to which it is sought to establish a novation (as if the liability of the old company were unlimited, and that of the new company limited), there is nevertheless no rule of law that requires the novation to be effected by a new written contract; but the novation may be effected by implication. And, as a general rule, where, upon the amalgamation of two companies, notice of that fact is given to a creditor of the old company, and in substance notice is given him that he may elect whether he will take the liability of the new company in lieu of that of the original company or not, then, although he do not by an express agreement assent to the novation, yet if he acts upon it and takes the benefits which he could only be entitled to upon the assumption that he has assented to it, that will be evidence on which the Court may find, and, unless there is something to contradict it, ought to find, that he has agreed to take the liability of the new company in substitution for that of the old one” (f).

Rights under Bank Charter Act.—As to the effect of amalgamation on the right of a bank to issue notes, and to a composition under this Act, reference should be made to Part VI. Chap. 1.

Income Tax.—In *Bell v. National Provincial Bank of England, Limited* (g), it appeared that the respondents were a banking company with a head office in London, at which the general affairs of the company were transacted, and with numerous branches, the working of which was regulated and supervised from the head

(e) See per Lord Hatherley in *In re Family Endowment Society* (1869), 5 Ch. 118, 133.

(f) Buckley on the Companies Acts, 8th ed. pp. 423, 424. Cf. *In re Commercial*

Bank Corporation of India and the East (1868), 18 L. T. 668; 16 W. R. 958; *In re Smith, Knight & Co., Ex parte Gibson* (1869), 4 Ch. 662.

(g) [1904] 1 K. B. 149.

office by a board of directors and a general manager. The ultimate profits divisible among the shareholders were the result of the trading of the company as a whole, irrespective of the profit or loss arising from a particular branch. The respondents acquired by purchase the whole of the business and the premises of a country bank, and opened the premises as a branch of their business; the profits, if any, made at the branch were merged in the general profits of the respondents' business, and it was impossible to ascertain the proportion of increase or decrease, if any, in those profits arising from the purchase. The respondents had not previously to the purchase had a branch or carried on any business in the town where the premises of the country bank were situate. Assessments for income tax for the three years following the purchase were made on the respondents on their own returns at their head office, based on the average profits of the whole of their business for the three preceding years, and the assessments included the profits, if any, made by the new branch, but it was impossible to differentiate between those profits and the general profits of the respondents' business. Additional assessments were made on the respondents for the said three years on assumed profits made by them, based as to the first of the three years on the average profits of the country bank for the three years preceding the purchase, and as to the second year on one-third of the profits of the two years preceding the purchase, and as to the third year on one-third of the profits of the year preceding the purchase. It was held that there had been a succession by the respondents to the business of the country bank within the fourth rule, applicable to the First and Second Cases, Sched. D. of s. 100 of the Income Tax Act, 1842 (5 & 6 Vict. c. 35), and accordingly that the assessments were right (*h*).

(*h*) Cf. *Capital and Counties Bank v. Bank of England* (1889), 61 L. T. 516; 5 T. L. R. 738; and *Prescott, Dimsdale, & Co. v. Bank of England*, [1894] 1 Q. B. 351, cited in Part VI. Chap. 1.

CHAPTER IV.

OFFICERS AND STAFF.

DIRECTORS.

“THE directors of a company fill a double character. They are (i) agents of the company, and (ii) trustees for the shareholders of the powers committed to them” (a).

Powers.

Directors occupy a position of authority similar to that of managing partners (b).

The scope of their powers depends upon the constitution and objects of the company. But their acts will bind the latter if they are within the limits of their apparent authority, even though outside that which is conferred upon them by the regulations of the company. “Agents cannot have a more extensive authority than their principals can legally confer upon them; and this principle at once limits the authority of all agents of incorporated companies. The capacity of such companies is itself limited, and they cannot be legally bound by any acts of their directors or officers in which the companies themselves are legally incompetent to engage. But as regards other matters, business cannot be carried on unless the directors of companies may be dealt with, on the assumption that

(a) Buckley on Companies Acts, 8th ed. p. 560.—As to the appointment and qualification of directors, see the Companies Act, 1900 (63 & 64 Vict. c. 48), ss. 2, 3.

(b) *In re Forest of Dean Coal Co.* (1878), 10 Ch. D. 450, 451.

they have power to bind their companies by all such acts as can fairly be said to be necessary for the purpose of carrying on their legitimate businesses in the way in which such businesses are usually carried on by other people. Such power is consequently implied in favour of all persons dealing *bonâ fide*, and without notice of its non-existence. Further, it is established that what the directors of a company have power to do, and do in the name of the company and on its behalf, binds the company, although they may not have acted in the manner prescribed by the regulations of the company. A distinction is thus taken between what directors have no power to do at all and what they have power to do, provided certain conditions are complied with; in other words, between acts which, as regards the company, are altogether *ultra vires*, and those which are *intra vires* but irregular; and whilst it is held that companies are not bound by acts of the former class, it is held that they may be bound by acts of the latter class in favour of all persons dealing with their directors *bonâ fide* and without notice of the irregularities of which they may be guilty" (c).

In *In re Asiatic Banking Corporation, Royal Bank of India's Case* (d), Lord Justice Giffard said:—"The Royal Bank of India . . . is constituted by a memorandum of association and by articles as a bank for the purpose of lending money, and that upon every species of security. From the very nature of such a company it must, without more, be inferred that the directors have all the ordinary powers which the managers of an ordinary bank would have, and you may safely deal with the managers of such a bank upon that assumption, unless there is something in the articles to restrict their powers. . . . If it is sought to import the bye-laws into transactions with third parties, it must . . . be shown that those third parties knew that there was a restriction upon the general powers of the agents."

"The general authority of the directors acting as a board extends to all acts reasonably necessary for management" (c).

(c) Lindley on Companies, 6th ed. p. 213.

(d) (1869), 4 Ch. 252, at p. 262.

(e) Buckley on Companies Acts, 8th ed. p. 558.

For instance, in *In re West of England Bank, Ex parte Booker* (f), it was held that the directors of a joint stock bank, the deed of settlement of which gave them extensive powers to carry on the business of bankers, and to act in such manner as might appear to them best calculated to promote the interest of the bank, had, when the formation of another company was of importance to the bank, power to guarantee the payment of interest on debentures of that company issued for the purpose of forming it.

In *In re Asiatic Banking Corporation, Royal Bank of India's Case* (g), a banking company I., the articles of which in general terms gave the directors very ample powers of management, advanced money on the deposit of shares in company A. The directors, becoming alarmed by a judicial opinion that the shares remained within the order and disposition of the depositors, passed a resolution to have the shares transferred into the name of company I. or its manager. They were accordingly transferred into the name of company I., the transfers being executed on behalf of company I. by an agent, not under the common seal. The company was registered as shareholder, sold some of the shares and received the purchase-money, and received the dividends on the rest. Company A. was afterwards ordered to be wound up. It was held that, although the acts of ownership exercised by company I. over the shares would not have prevented its repudiating them if the transaction had been *ultra vires*, company I. was rightly placed on the list of contributories; for that, although buying the shares of another company as a speculation would have been *ultra vires*, it was within the powers of the company, as bankers, to advance money on the deposit of shares, and to do all such acts as were reasonable and proper for making the security available; and, also, that the fact of the transfer not being accepted by the company under its seal was immaterial.

"Of course," said Lord Justice Giffard, "although no banker is authorized to become a partner with merchants, or shipowners, or builders, or to engage in transactions of that sort, yet he is

(f) (1880), 14 Ch. D. 317.

(g) (1869), 4 Ch. 252, cited at p. 45, *supra*.

authorized to lend upon securities of that description, and he is authorized to take every rational course for the purpose of making his securities good and available. In that way he may become liable upon a building contract; in that way he may become liable as a shipowner; in that way he may become liable in respect of matters of freight, or, in fact, in respect of any matters connected with a bill of lading which he holds as a security. I entirely found my judgment on this, that it is within the scope of an ordinary banking business to make the loans which have been made, and to take the deposit of shares as a security; and when the directors, having done so, afterwards took a reasonable and *bonâ fide* course to realize those securities, they cannot now turn round and say that what they did for that purpose was *ultra vires*, and not justified by their articles of association."

"A power to borrow is so necessary to a banking company that its directors can scarcely be deprived of it; and there are several cases in the books in which their power was held to have been exercised so as to bind the company" (*h*).

In this connection reference may be made to Part VIII. Chap. 3.

Duties.

Directors (*i*) occupy a fiduciary position. They are bound to observe good faith towards their shareholders, and towards those who take shares from the company and become co-adventurers with themselves and others who may join them (*h*), and to exercise their powers with reasonable diligence (*l*) and with a view to the benefit of the company as a whole (*m*).

(*h*) Lindley on Companies, 6th ed. p. 289, referring to *Bank of Australasia v. Breillat* (1847), 6 Moo. P. C. 152; 12 Jur. 189; *MacLae v. Sutherland* (1854), 3 E. & B. 1; *Royal British Bank v. Turquand* (1855), 5 E. & B. 248; 6 E. & B. 327; and *Galloway's Case* (1854), 18 Jur. 885.

(*i*) Persons who are directors *de facto*, though not *de jure*, may be held liable as such: *Coventry and Dixon's Case* (1880), 14 Ch. D. 660, cited by Lindley and A. L. Smith, L. J., in *In re Western*

Counties, &c. Co., [1897], 1 Ch. 617, at pp. 627, 630.

(*k*) Per Lindley, M. R., in *Alexander v. Automatic Telephone Co.*, [1900] 2 Ch. 56, at p. 67.

(*l*) See cases cited on pp. 49—51, *infra*.

(*m*) See *Gilbert's Case* (1870), 5 Ch. 559; *Alexander v. Automatic Telephone Co.*, see note (*k*); *Richardson v. Larpent* (1843), 2 Y. & C. C. C. 507; 7 Jur. 691; *Harris v. North Devon Rail. Co.* (1855), 20 Beav. 384.

Accounting for Profits.—"It follows as a necessary consequence of their position that directors of a company are bound to account to the company for all profits made by themselves by the employment of the assets of the company, and for all profits made by them at the expense of the company, unless they can show that the company, with a full knowledge of all the facts, has agreed to allow them to retain such profits for their own benefit" ⁽ⁿ⁾. Many illustrations of this rule are to be found in the reports.

In *Parker v. McKenna* ^(o) the defendants, in 1864, were four of the directors of a joint stock bank. In that year resolutions were passed to increase the capital by the issue of 20,000 new 50*l.* shares, which were to be offered to the old shareholders at the rate of one new share for each old share held by them, each allottee paying for each share 25*l.* premium, and 5*l.* as a first call. The shares not taken up by them were to be disposed of by the directors at 30*l.* premium. The directors entered into an arrangement with S., for him to take at 30*l.* premium all the shares not taken up by the old shareholders. In pursuance of this, 9,778 shares were allotted to S., who paid only 5*l.* per share, it being arranged that the certificates for these shares should be withheld, that the bank should have a lien on them for the premiums, and that no transfer from him to any purchaser should be registered till the 30*l.* per share on the shares transferred had been paid. S., being unable to take up so many shares, applied to the defendants to relieve him of some of them, and they severally took from him considerable numbers at 30*l.* per share, and afterwards disposed of them at a profit, the 30*l.* per share being paid to the bank at the times when the shares were respectively registered in the names of purchasers. It was held that the defendants must account to the bank for the profits made by them respectively by sale of the shares.

"Directors who so use their powers as to obtain benefits for themselves at the expense of the shareholders, without informing them of the fact, cannot retain those benefits, and must account for them to the company, so that all the shareholders may partici-

⁽ⁿ⁾ Lindley on Companies, p. 511.

^(o) (1874), 10 Ch. 96.

pate in them. *Gilbert's Case* (*p*) is only one of many instances illustrating this principle" (*q*).

Accordingly, if directors require other applicants for shares to make payments on application and allotment, and issue their own shares for which they have subscribed the memorandum without requiring any such payments to be made, and without disclosing to the other shareholders this difference between their position and that of the directors, they commit a breach of duty, even though in so doing they act without fraud, and in the belief that they are doing nothing wrong (*r*).

Liability for Losses.

If assets of the company are lost through being employed by the directors in a way not justified by the regulations of the company (*s*), or through their wilful misconduct, or through their negligence, they will be responsible (*t*).

"If directors act within their powers, if they act with such care as is reasonably to be expected of them, having regard to their knowledge and experience, and if they act honestly for the benefit of the company they represent, they discharge both their equitable as well as their legal duty to the company. . . . The amount of care to be taken is difficult to define; but it is plain that directors are not liable for all the mistakes they may make, although, if they had taken more care, they might have avoided them: see *Overend & Gurney Co. v. Gibb* (*u*). Their negligence must be not the omission to take all possible care; it must be

(*p*) (1870), 5 Ch. 559.

(*q*) Per Lindley, M. R., in *Alexander v. Automatic Telephone Co.*, [1900] 2 Ch. 56, at p. 67.

(*r*) *Alexander v. Automatic Telephone Co.*, see last note. See also *Madrid Bank v. Pelly* (1869), 7 Eq. 442.

(*s*) *Masonic, &c. Co. v. Sharpe*, [1892] 1 Ch. 154, 165; and see *Cullerne v. London and Suburban, &c. Building Society*

(1890), 25 Q. B. D. 485.

(*t*) *In re Railway and General Light, &c. Co., Marzetti's Case* (1880), 42 L. T. 206; 28 W. R. 541; *Merchants' Fire Office v. Armstrong*, W. N. (1901) 163; *Western Bank of Scotland v. Bairds* (1862), 24 Sess. Cas. (2nd Ser.), 859, cited in *Turquand v. Marshall* (1869), 4 Ch. 376, at pp. 382, 385.

(*u*) (1872), 5 E. & I. A. 480.

much more blameable than that: it must be in a business sense culpable or gross" (x).

Facts which show imprudence in the exercise of powers conferred upon directors will not subject them to personal responsibility; the imprudence must be so great and manifest as to amount to *crassa negligentia* (y); as, for example, if they were cognisant of circumstances of such a character, so plain, so manifest, and so simple of appreciation, that no men with any ordinary degree of prudence, acting on their own behalf, would have entered into such a transaction as they entered into (z). But if they are authorized to do an act in itself imprudent, they are not to be held responsible for the consequences of doing it (a). Nor are they liable for mere errors of judgment (b).

"There is no case, it is believed, in which directors have been held answerable for losses sustained by their mere innocent mistake, nor unless that mistake has been accompanied by some fraudulent or at least suspicious conduct or motive" (c).

So directors of a banking company have been held not liable to the company for including in their accounts as good, debts which were, in fact, bad, when they could not be fixed with knowledge of the fact (d).

And where the deed of settlement of a banking company provided that when one-fourth of the capital was lost, the directors should call a meeting, and the company should be dissolved, and considerably more than one-fourth of the capital having been lost, a meeting was called at which the shareholders resolved to continue the bank, and afterwards further losses were incurred, but no such meeting was called again, it was held that, as the shareholders

(x) Per Lindley, M. R., in *Lagunas Nitrate Co. v. Lagunas Syndicate*, [1899] 2 Ch. 392, at p. 435.

(y) *Overend & Gurney Co. v. Gibb* (1872), 5 E. & I. A. 480. This case was distinguished in *In re Railway and General Light, &c. Co., Marzetti's Case*, see note (t), *supra*.

(z) Per Lord Chancellor Hatherley in *Overend & Gurney Co. v. Gibb*, at p. 487

of the report referred to in the last note.

(a) See last cited case.

(b) *In re Brighton Brewery Co., Hunt's Case* (1868), 37 L. J. Ch. 278, at p. 280; *London Financial Association v. Kelk* (1883), 26 Ch. D. 107, 144.

(c) Buckley on Companies Acts, 8th ed. p. 563.

(d) *Dovey v. Cory*, [1901] A. C. 477, cited further at pp. 51—54, *infra*.

knew that the bank was going on after more than one-fourth of the capital had been lost, the directors were not liable for continuing the bank (*e*).

A director is necessarily entitled to repose reasonable confidence in the other officers of the company. Thus, in *Dovey v. Cory* (*f*), it was held that a director of a joint stock banking company who, in assenting to the payment of dividends out of capital and to advances on improper security, honestly relied on the judgment, information, and advice of the chairman and general manager of the bank, by whose statements he was misled, and whose integrity, skill, and competence he had no reason for suspecting, was not negligent of his duties as director, and was not liable in the winding-up to repay the losses thereby incurred.

“The charge of neglect,” said the Lord Chancellor (*g*), “appears to rest on the assertion that Mr. Cory, like the other directors, did not attend to any details of business not brought before them by the general manager or the chairman, and the argument raises a serious question as to the responsibility of all persons holding positions like that of directors, how far they are called upon to distrust and be on their guard against the possibility of fraud being committed by their subordinates of every degree. It is obvious if there is such a duty it must render anything like an intelligent devolution of labour impossible. Was Mr. Cory to turn himself into an auditor, a managing director, a chairman, and find out whether auditors, managing directors, and chairmen were all alike deceiving him? That the letters of the auditors were kept from him is clear. That he was assured that provision had been made for bad debts, and that he believed such assurances, is involved in the admission that he was guilty of no moral fraud; so that it comes to this, that he ought to have discovered a network of conspiracy and fraud by which he was surrounded, and found out that his own brother and the managing director (who have since been made criminally responsible for frauds connected with their respective offices) were inducing him to make representations as to the

(*e*) *Turquand v. Marshall* (1869), 4 Ch.
376.

(*f*) See note (*d*), *supra*.

(*g*) At p. 485 of the report.

prospects of the concern and the dividends properly payable which have turned out to be improper and false. I cannot think that it can be expected of a director that he should be watching either the inferior officers of the bank or verifying the calculations of the auditors himself. The business of life could not go on if people could not trust those who are put into a position of trust for the express purpose of attending to details of management. If Mr. Cory was deceived by his own officers—and the theory of his being free from moral fraud assumes under the circumstances that he was—there appears to me to be no case against him at all. The provision made for bad debts, it is well said, was inadequate; but those who assured him that it was adequate were the very persons who were to attend to that part of the business; and so of the rest. If the state and condition of the bank were what was represented, then no one will say that the sum paid in dividends was excessive. If I assume, as I do, that Mr. Cory acted upon representations made to him which he believed and which came from the officers of the bank, to whom he was, in my judgment, justified in giving credit, the discussion of whether the dividends actually paid were or were not properly divisible has no bearing on Mr. Cory's liability, and I am very reluctant to give any opinion upon it, inasmuch as the question may arise, when it may be necessary to decide it."

Lord Davey in the course of his speech said (*h*): "I am not, I think, doing injustice to the appellant's case when I say that reliance was chiefly placed on the 'weekly states' and 'quarterly returns' made by the branch managers, or that if he cannot succeed in fixing the respondent with liability on these documents, his case fails. These returns were laid on the table in the board room at each meeting of the directors. The comparative analysis of them, made by the skilled accountant who advises the appellant, does, I think, show that certain accounts which were treated as good by the general manager in the preparation of the balance-sheets, submitted by him to the directors, were, in fact, irretrievably bad, and it is difficult to acquit the general manager of improper conduct in

(*h*) At p. 491 of the report.

including them as assets. The respondent says in his affidavit that the 'weekly states' consisted each week of a very large and voluminous pile of sheets, which it would have taken the directors a couple of days to go through, and that it was the duty of the general manager to go through the weekly states, with the letters of the branch managers accompanying them, and to place upon the agenda any points arising upon them which he considered ought to be brought to the attention of the directors; and upon the discussion of such points the documents were, when necessary, referred to; but, except in such cases, the weekly states were not consulted by the directors, but they relied on the general manager going carefully through them and drawing their attention to any matter requiring their consideration. On cross-examination he adhered to this statement. He added that the chairman also went through them often individually, and he did so for the board. He admitted that, before recommending a dividend, he did not look at all the accounts or look at the books themselves, but he said that the directors looked at the documents which were put before them by the manager—the amount which he considered was doubtful and bad—and they made a reserve for it. He also said that it was never brought before him that amounts due from bankrupt debtors were included in the balance-sheet of each year, and he never heard of any single case of that kind. It further appeared, from the evidence of other witnesses, that the branches of the bank were regularly visited and their books examined by the chairman and two inspectors. In this state of the evidence, my Lords, I ask whether the course of business at the board meetings, as described by the respondent, was a reasonable course to be pursued by the respondent and other directors, or whether the knowledge which might have been derived from a careful and comparative examination of the weekly states and quarterly returns from the different branches of the bank ought to be imputed to the respondent, or (alternatively) whether he was guilty of such neglect of his duty as a director as would render him liable to damages. I do not think that it is made out that either of the two latter questions should be answered in the affirmative. I

think the respondent was bound to give his attention to and exercise his judgment as a man of business on the matters which were brought before the board at the meetings which he attended, and it is not proved that he did not do so. But I think he was entitled to rely upon the judgment, information, and advice of the chairman and general manager, as to whose integrity, skill, and competence he had no reason for suspicion. I agree with what was said by Sir George Jessel in *Hallmark's Case* (i), and by Chitty, J., in *In re Denham & Co.* (k), that directors are not bound to examine entries in the company's books. It was the duty of the general manager and (possibly) of the chairman to go carefully through the returns from the branches, and to bring before the board any matter requiring their consideration; but the respondent was not, in my opinion, guilty of negligence in not examining them for himself, notwithstanding that they were laid on the table of the board for reference" (l).

But the trust reposed by directors in others must not be blind or unqualified, or to the exclusion of the exercise of their own judgment; nor must they disregard the directions contained in the regulations of their company. This is illustrated by *Leeds Estate Building and Investment Company v. Shepherd* (m). There the articles of association of a limited company, formed in 1869 for the purpose of lending money on security, provided (1) that when the company should pay a dividend of 5 per cent. the directors should receive a fixed sum for each attendance, and a further fixed sum for every additional 1 per cent. of dividend; (2) that the directors might declare dividends upon such estimates of account as they might see proper to recommend, so that no dividend should be payable except out of profits; (3) that they should annually lay before the company a statement of the income and expenditure of the past year, and a balance-sheet containing a summary of the property and expenditure of the company; (4) that the accounts of

(i) (1878), 9 Ch. D. 329.

(k) (1883), 25 Ch. D. 752.

(l) As to the subject of payment of dividends out of capital, see Buckley on the Companies Acts, 8th ed. pp. 584—592;

Lubbock v. British Bank of South America, [1892] 2 Ch. 198; *Foster v. New Trinidad, &c. Co.*, [1901] 1 Ch. 208; *Bond v. Barrow Hematite Steel Co.*, [1902] 1 Ch. 353.

(m) (1887), 36 Ch. D. 787.

the company should be examined every year with the vouchers relating thereto, and the correctness of the balance ascertained by an auditor, who should make a report to the members on the balance-sheet and accounts stating whether, in his opinion, the balance-sheet was a full and fair balance-sheet, containing the particulars required by the articles, and properly drawn up so as to exhibit a correct view of the state of the company's affairs. The company never made any annual profits except in one year, when it made a profit of less than 5 per cent., but the directors in every year from 1870, when the company commenced business, declared and paid a dividend of 5 per cent. and upwards; and they remunerated themselves on the corresponding scale, and, under the authority of a resolution of the company, paid bonuses to the manager. Such payments were in fact made out of capital. The balance-sheets on which the dividends were declared were prepared not by the directors, but by the manager. They were delusive, they over-estimated the assets of the company, and were framed with the object of showing a profit available for a dividend. The auditor never looked at the articles of association, but accepted the statements of the manager, and certified from time to time that the accounts submitted to him were true copies of those shown in the books of the company. No proper statement of income and expenditure or auditor's report was ever laid before the company. The directors did not know the true state of the company's affairs, or that the balance-sheets were delusive. They never exercised any judgment with reference to the accounts, but relied entirely on the manager and auditor. It was held (1) that the directors had fallen short of the standard of care which they ought to have applied to the affairs of the company, and that the onus was upon them to show that the dividends had been paid out of profits; (2) that upon the evidence they had failed to show this, and that they were jointly and severally liable to make good all sums improperly paid out of capital in respect of dividends to the shareholders, directors' remuneration, and bonuses to the manager; (3) that it was the duty of the auditor, in auditing the accounts of the company, not to confine himself to verifying the arithmetical accuracy of the balance-sheet, but to inquire into its substantial

accuracy, and to ascertain that it contained the particulars specified in the articles of association, and was properly drawn up so as to contain a true and correct representation of the state of the company's affairs; and (4) that, as the improper payments by the directors were the natural and immediate consequence of breach of duty on the part of the manager and the auditor, the manager and auditor were liable in damages to the amounts so paid, except, in the case of the auditor (who had pleaded the Statute of Limitations), so much thereof as was covered by the statute (*n*).

MANAGER.

The description "manager" of a named bank *prima facie* applies to the general manager, and not to the manager of a branch, although the document containing the description may have been delivered at the branch bank (*o*).

A man who performs the work of a manager of a bank is the *de facto* manager, and, accordingly, comes within the terms of an Act providing that every "manager" who shall knowingly and wilfully authorize or permit a default being made in forwarding a list of members to the Registrar of Joint Stock Companies shall incur a penalty (*p*).

Scope of Authority.

The manager of a bank is the general agent of the company in banking business (*q*).

In the exercise of his authority he is subject to the control of

(*n*) As to the liability of directors for statements in prospectuses and notices inviting subscriptions for shares, see the Directors' Liability Act, 1890 (53 & 54 Vict. c. 64).

(*o*) See per Erskine, J., in *Robertson v. Sheppard* (1840), 1 M. & G. 511, at p. 517.

(*p*) *Gibson v. Barton* (1875), L. R. 10 Q. B. 329, referred to with approval by Lindley and A. L. Smith, L. JJ., in *In re Western, &c. Co.*, [1897] 1 Ch. 617, at pp. 627, 629.

(*q*) Per Willes, J., delivering the judgment of the Court in *Barwick v. English Joint Stock Bank* (1867), L. R. 2 Ex. 259.

the board of directors. But the company will be bound by his acts not only where they are within the limits of the authority conferred upon him by his instructions, but also where they are within the scope of his apparent authority. This will vary according to circumstances (*r*).

“The duties of a bank manager would usually be to conduct banking business on behalf of his employers, and when he is found so acting, what is done by him in the way of ordinary banking transactions may be presumed, until the contrary is shown, to be within the scope of his authority; and his employers would be liable for his mistakes, and, under some circumstances, for his frauds, in the management of such business” (*s*).

In determining in any given case whether a transaction was within the scope of a manager's authority, it may be necessary to consider his actual position in regard to the circumstances (*t*). The authority of a branch manager will ordinarily be confined to the transaction of the local business of the bank. For example, he will have implied power to call in money which has been advanced from his branch at call (*u*); while the concerns of other branches will be beyond the limits of his authority. On the other hand, a general manager, in matters coming within the scope of the ordinary business of the bank, may be said to represent the entire corporation.

The limits within which, in the absence of evidence to the contrary, the Courts will hold a manager to be confined may be illustrated by the following examples.

An agreement with a customer that a promissory note or other draft given by him against an overdraft shall not be presented is not within the ordinary scope of a manager's authority (*x*). Nor

(*r*) See per Blackburn, J., in *Gibson v. Barton* (1875), L. R. 10 Q. B. 329, at p. 337.

(*s*) Per Sir Montague Smith in *Bank of New South Wales v. Owston* (1879), 4 A. C. 270, at p. 289.

(*t*) Per Bowen, L. J., in *In re Southport and West Lancashire Banking Co.*

(1885), 1 T. L. R. 204.

(*u*) Per Coltman, J., in *Robertson v. Sheward* (1840), 1 M. & G. 511, at p. 517. See also per Knight-Bruce, L. J., in *Collinson v. Lister* (1855), 7 De G. M. & G. 634, at p. 637.

(*x*) *Bosanquet v. Forster* (1841), 9 C. & P. 659; *Bosanquet v. Corser* (1841), *ibid.* 664.

is a guarantee of the payment of a bill of exchange accepted by a customer of the bank in favour of a stranger (*y*).

The arrest or prosecution of offenders is not within the ordinary routine of banking business, and therefore not within the ordinary scope of a bank manager's authority. Accordingly, in order to render a banking company liable in respect of a wrongful arrest or prosecution at the instance of a manager, it would be necessary to show that such arrest or prosecution was within the scope of the duties and class of acts which such manager was authorised to perform. The authority may be general, or it may be special, and derived from the exigency of the particular occasion on which it is exercised. In the former case it would commonly be enough to show that the agent was acting in what he did on behalf of the principal; but in the latter case it would be necessary to prove a state of facts showing that such exigency was present, or from which it might reasonably be supposed to have been present.

This was laid down in *Bank of New South Wales v. Ouston* (*z*). There Sir Montague E. Smith, delivering the judgment of the Judicial Committee, said: "The arrest, and still less the prosecution, of offenders is not within the ordinary routine of banking business; and when the question of a manager's authority in such cases arises, it is essential to inquire carefully into his position and duties. These may, and in practice do, vary considerably. In the case of a chief or general manager invested with general supervision and power of control, such an authority, in certain cases affecting the property of the bank, might be presumed from his position to belong to him, at least in the absence of the directors. The same presumption might arise in the instance of a manager conducting the business of a branch bank at a distance from the head office and the board of directors. But whatever may be the case in instances of this kind, their Lordships think that such a presumption cannot properly be made from the evidence given at the trial as to the position held by Mr. Wilkinson. It appears that the board of directors held their meetings at the bank office,

(*y*) *In re Southport and West Lancashire Banking Co.*, see note (*t*), *supra*.

(*z*) (1879), 4 A. C. 270.

and the general manager, Mr. Smith, also sat there ; and the clear inference from the evidence (if believed) is, that the acting manager was subordinate to the general manager, and that the latter was, as he presumably would be, subject to the superior authority of the directors. Supposing that to be so their Lordships think it cannot be presumed from his position alone that the acting manager had general authority to prosecute on behalf of the bank, and therefore that evidence was required to show that such a power was within the scope of the duties and class of acts he was authorised to perform."

If the manager does anything within the scope of his authority and purports to do it for the banking company, although in doing it he commits a wrong which neither the company nor the directors sanctioned or intended, the company will be liable (a).

The three following cases illustrate the liability of the company for the frauds of its manager.

In *Barwick v. English Joint Stock Bank* (b) the plaintiff, having for some time, on a guarantee of the defendants, supplied J. D., a customer of theirs, with oats on credit for carrying out a government contract, refused to continue to do so unless he had a better guarantee. The defendants' manager thereupon gave him a written guarantee to the effect that the customer's cheque on the bank in the plaintiff's favour, in payment for the oats supplied, should be paid on receipt of the government money in priority to any other payment "except to this bank." J. D. was then indebted to the bank to the amount of 12,000*l.*, but this fact was not known to the plaintiff, nor was it communicated to him by the manager. The defendant thereupon supplied the oats to the value of 1,227*l.*; the government money, amounting to 2,676*l.*, was received by J. D. and paid into the bank, but J. D.'s cheque for the price of the oats drawn on the bank in favour of the plaintiff was dishonoured by the defendants, who claimed to retain the whole sum of 2,676*l.* in payment of J. D.'s debt to them. It was

(a) Per Lord Herschell in *Thorne v. Watson*, cited at p. 65, *infra*.
Heard and Marsh, [1895] A. C. 495, at p. 502. See also *Bank of Scotland v.*

(b) (1867), L. R. 2 Ex. 259.

held that there was evidence to go to the jury that the manager knew and intended that the guarantee should be unavailing, and fraudulently concealed from the plaintiff the fact which would make it so, and that the defendants would be liable for such fraud in their agent.

In *Mackay v. Commercial Bank of New Brunswick* (c) an officer of a banking corporation, whose duty it was to obtain the acceptance of bills of exchange in which the bank was interested, fraudulently, but without the knowledge of the president or directors of the bank, made a representation to A., which, by omitting a material fact, misled A. and induced him to accept a bill in which the bank was interested, and A. was compelled to pay the bill. It was held that A. could recover from the bank the amount so paid (d).

In *Thompson v. Bell* (e) the plaintiff kept a deposit account at a joint stock bank. The manager represented to him that the bank had an equitable mortgage on some houses of a third person, subject to a mortgage of 400*l.*, and advised him to purchase the houses for 595*l.*, 400*l.* to be paid in discharge of the mortgage, and 195*l.* to the bank. The plaintiff consented, and took his deposit receipts to the manager at the bank, who, on presenting them to a clerk, obtained from him 595*l.* The manager then gave the plaintiff a receipt in his own name, stating that 195*l.* was the balance of the purchase-money of the houses, and that 400*l.* was deposited with him to pay off the mortgage. He afterwards absconded with the 595*l.* The plaintiff having brought an action against the bank to recover the money, the jury found that the manager intended to make the plaintiff believe, and that the plaintiff did believe, that the manager was acting in this transaction as agent for the bank. It was held that the bank was responsible for the money (f).

If, however, the manager in the transaction which constitutes

(c) (1874), 5 P. C. 394.

(d) This and the preceding case were approved in *Swire v. Francis* (1877), 3 A. C. 106.

(e) (1854), 10 Ex. 10.

(f) See also *Slee v. International Bank* (1867), 17 L. T. 425; and cf. *Yarborough v. Bank of England* (1812), 16 East, 6.

a wrongful act is not acting for, or purporting to be acting for, the bank, the company will not be liable (*g*).

Thus, in *Barnett, Hoares & Co. v. South London Tramways Co.* (*h*), the company was held not responsible for a fraudulent misrepresentation made by its secretary, on the ground that it was not within the scope of his duty to make representations on behalf of the company (*i*).

A representation respecting the credit of a person stands upon a special footing. By the 9 Geo. 4, c. 14, s. 6, no action can be maintained thereon unless it is in writing and signed by the person making it. Accordingly, a banking company cannot be sued in respect of a representation of this class made and signed by its manager, or, indeed, at all (*k*).

In *Swift v. Jewsbury* (otherwise *Swift v. Winterbotham*) (*l*) the plaintiff sued J. and G. jointly for a false representation with respect to the solvency of R. The defendant J. was sued as the public officer of a banking company formed under 7 Geo. 4, c. 46, and the defendant G. was the manager at one of their branches. The plaintiff was a customer of the S. bank, and requested the manager of that bank to inquire for him as to R.'s credit. The manager wrote a letter addressed to the manager of the defendant's banking company requesting information whether R. was responsible to the extent of 50,000*l*. The defendant G. replied in his own name, signing his letter as manager, and giving a favourable account of R.'s responsibility. The plaintiff in consequence of this letter supplied R. with goods, for which he never was paid in consequence of R.'s insolvency. The statement made by G. was false to his knowledge. The defendant's banking company had no knowledge, otherwise than through G., that such letter had been written, and gave him no express authority to write the

(*g*) See per Lord Herschell in *Thorne v. Heard and Marsh*, [1895] A. C. 495, at p. 502; and *British Mutual Banking Co. v. Charnwood Forest Rail. Co.* (1887), 18 Q. B. D. 714.

(*h*) (1887), 18 Q. B. D. 815.

(*i*) See also *British Mutual Banking Co. v. Charnwood Forest Rail. Co.*, see note (*g*), *supra*; *George Whitechurch, Limited v. Cavanagh*, [1902] A. C. 117.

(*k*) See *Hirst v. West Riding Union Banking Co.*, [1901] 2 K. B. 560.

(*l*) (1874), L. R. 9 Q. B. 301.

letter ; but the writing of such a letter was an act done within the scope of the general authority conferred on G. as manager. It was held (1) that G. was liable personally for the false representation ; (2) that by 9 Geo. 4, c. 14, s. 6, a false representation as to the credit of another person, in order that an action may be maintained thereon, must be signed by the person making it, and not by an agent ; and that, therefore, if G. were to be considered an agent, the banking company was not liable ; (3) that the signature of G. to the letter could not be considered the signature of the banking company itself ; and (4) that the letter was the representation of G., and not the representation of the banking company.

“ It is true,” said Bramwell, B., “ that the jury have found that it was within the scope of the manager’s authority to give the information asked for, and if the manager were to refuse to give it he would be doing a wrong to the bank which employed him, because he would be refusing a courtesy which it was their habit to show, in order that a corresponding courtesy might be shown to them ; but in no other sense was it his duty or within the scope of his authority to do it. He had permission to do it, and ought to do it ; but the application is made to him individually, and his individual knowledge of the matter is trusted. . . . The inquiry is made of Goddard ” (the manager) “ as to his personal knowledge, and it is he who is trusted in the answer to that inquiry ” (m).

In connection with representations of this kind, reference should be made to Part VII. Chap. 3, and Part VIII. Chap. 4.

Duties and Liabilities.

A manager is bound to display reasonable diligence in his office, and to account to the company for any profit which accrues to him in connection with his position.

If the constitution of the company, or the terms of the agreement under which the manager is employed, provide that he is not

(m) See also *Williams v. Mason* (1873), 28 L. T. 232 ; 21 W. R. 386 ; *Hosegood v. Bull* (1876), 36 L. T. 617.

to be liable for loss sustained by the company unless it happens in consequence of his wilful neglect or default, he will not be liable for a mere failure to use due and proper care in advancing money and in discharging his other functions.

In *Ward v. Greenland* (*n*), where this point was decided, Montague Smith, J., in delivering judgment, said: "Upon the whole, it seems to me that the intention of the clause was, that the officers of the company should not be liable for losses arising from ordinary want of care, but only for something like intentional negligence or wilful disregard of the duties of their office. If the evidence at the trial should be . . . a long series of negligent acts, that might warrant the jury in coming to the conclusion that the defendant had not been guilty of mere forgetfulness or want of care, but of something which amounted to wilful neglect."

Accounting for Profits.—In *General Exchange Bank v. Horner* (*o*), where a commission had been received by a manager for negotiating the amalgamation of the business of two banks, Lord Romilly, M. R., said: "He was a manager, bound to consult the shareholders' interests solely, and he cannot, in my opinion, retain to himself a pecuniary benefit obtained by him in his character of manager not known to and not sanctioned by the shareholders who employed him."

So, in *Gwatkin v. Campbell* (*p*), it was held that a manager of a bank is not entitled to grant himself the same accommodation in respect of a separate trade which he might obtain from an independent banker, and that it would be necessary for him, in order to sustain any such transaction, to show that he had brought the whole circumstances most fully and fairly before the directors. It is not enough to show merely that he had not concealed anything. If, however, he could show that he had so brought the circumstances to their knowledge, or that the directors had sanctioned the proceeding subsequently, it might be permitted to stand.

On the other hand, in *Bank of Upper Canada v. Bradshaw* (*q*), which was an action brought by a banking company against their

(*n*) (1865), 19 C. B. N. S. 527.

(*o*) (1870), 9 Eq. 480.

(*p*) (1854), 1 Jur. N. S. 131.

(*q*) (1867), L. R. 1 P. C. 479.

late manager and cashier to recover moneys belonging to the bank, alleged to have been improperly applied in discounting bills, &c. for his own advantage, for the benefit of parties and companies with whom he was connected, and in which he was interested, it appeared that such transactions were all in the ordinary course of the business of the bank, that he had not exceeded the power and authority with which he was entrusted, and that no case of bad faith could be proved against him. It was accordingly held that no action could be sustained (r).

Misfeasance.

In any case in which a manager or other officer of the company has been guilty of a breach of his duty as such officer, and pecuniary loss to the company has ensued by the misapplication of its assets, he may either be sued in an ordinary action or proceeded against in the winding-up of the company under sect. 10 of the Companies (Winding-up) Act, 1890 (s).

Residence in Bank House.

Where the manager or agent of a bank is bound, as part of his duty, to occupy the bank house as custodian of the whole premises belonging to the bank, and also for the transaction of any special bank business after bank hours, but is not entitled to sub-let the bank house or use it for other than bank business, and in the event of his ceasing to hold office is under an obligation to quit the premises forthwith, the yearly value of the privilege of free residence cannot be brought into account in estimating his total income for the purposes of the assessment of income tax (t). In the words of Lord Watson, the manager "does, no doubt, reside in the building, but he does so as the servant of the bank and for the purpose of performing the duty which he owes to his employers. His position does not differ

(r) See *Leeds Estate Building, &c. Co.* 2 Ch. 279.
v. *Shepherd*, cited at p. 54, *supra*.

(s) 53 & 54 Vict. c. 63. See *In re* (t) *Tenant v. Smith*, [1892] A. C. 150.
Kingston Cotton Mill Co. (No. 2), [1896]

in any respect from that of a caretaker or other servant, the nature of whose employment requires that he shall live in his master's dwelling-house or business premises, instead of occupying a separate residence of his own" (u).

Agent.—The person in charge of a sub-branch or local agency will usually be in a similar position in law to that of a manager; but if he carries on a separate business of his own, it will be a question depending upon circumstances whether in a particular case he has acted, or purported to act, on behalf of the bank or in his individual capacity.

In *Bank of Scotland v. Watson* (x) it appeared that James Smith and his two sons had been appointed agents for the Bank of Scotland at Brechin, where they transacted not only the business of the bank, but also private banking business of their own. The respondent had received from them a document as follows:—

Bank Office, Brechin, 25th March, 1803.

£60.

Received from Mr. James Watson, Brechin, sixty pounds sterling, at his credit, bearing interest at the rate of three per cent. on demand, or four per cent. if not returned in six months.

(Signed) SMITH & SONS.

Smith & Sons having become bankrupt, the House of Lords held that the Bank of Scotland were not bound by this instrument.

AUDITORS.

The appointment of auditors has been already dealt with (y).

Duties.

An auditor should ascertain what duties are imposed upon him by the regulations of the company whose accounts he is to audit. He must also bear in mind the statutory provisions affecting his position (z).

(u) Cf. *M'Dougal v. Sutherland*, W. N. [1899] A. C. 53.

(1896) 113; 21 Rett. 753; *Corke v. Fry*, (x) (1813), 1 Dow, 40.

W. N. (1896) 128; 22 Rett. 422; *A.-G.* (y) See pp. 30—32.

v. Beech, [1898] 2 Q. B. 147, at p. 150; (z) *Ibid.*

The general principles by which he must be guided in dealing with the accounts have been enunciated by the Courts.

Although it is not the duty of the auditors of a company appointed under the Companies Act, 1879, to consider whether its business is prudently or imprudently conducted, it is their duty to consider and report to the shareholders whether the balance-sheet exhibits a correct view of the state of the company's affairs, and the true financial position of the company at the time of the audit. They must ascertain this by examining the books of the company, and must take reasonable care that what they certify as to the company's financial position is true; and, except in very special cases, it is their duty to place before the shareholders the necessary information as to the true financial position of the company, and not merely to indicate the means of acquiring it.

In *In re London and General Bank* (No. 2) (a), an auditor presented a confidential report to the directors, calling their attention to the insufficiency of the securities on which the capital of the company was invested, and the difficulty of realizing them, but in his report to the shareholders he merely stated that the value of the assets was dependent on realization, and in the result the shareholders were deceived as to the condition of the company, and a dividend was declared out of capital, and not out of income. It was held that the auditor had been guilty of misfeasance under sect. 10 of the Companies (Winding-up) Act, 1890, and was liable to make good the amount of the dividend paid.

In the course of his judgment on the appeal in this case, Lord Justice Lindley said: "Whether the payment was made out of capital or not is a question of fact. The payment was professedly made out of profits made by the bank, by charging its customers with interest and commission on loans and discount. The books showed such profits; but the question is, Where did the money come from with which the dividends were paid? The money came from cash at the bankers or in hand; but this cash could not be properly treated as profit, and the directors and auditors knew this perfectly well. . . . I entirely agree with the learned judge

(a) [1895] 2 Ch. 673.

in saying that the profits for the year 1891 never really existed except on paper, and that, to use his words, 'whatever may be the right line to draw as to when profit not received may be carried to profit for the purpose of the annual revenue account, it is plain that there was no justification for so doing in the present case.' The real truth is that the assets of the bank were put down in the balance-sheet at far too high a figure, and this entry, though not misleading if explained (as it was to the directors), was seriously misleading in the absence of explanation." The auditor "says that he regarded the assets of the bank as only locked up; but his report, and the schedule to it, go far beyond this. The value of the principal asset depended on the probability of the Balfour group of companies, and some of the other large borrowers, repaying their loans. They were financing each other; their indebtedness to the bank had increased largely during the year; the securities held by the bank for these loans were, to say the least, to a great extent of very doubtful value; and yet the total amount due to the bank in respect of these loans is inserted in the balance-sheet as a good asset, without any deduction and without a word of explanation to the shareholders. We know now that those assets have realized a comparatively small sum, and we were very properly warned against the danger of doing injustice by being wise after the event. But, disregarding the result of realization, and attending only to what was known to the auditors in February, 1892, the entry in the balance-sheet of the sum of 346,975*l.* as a good asset was wholly unjustifiable, unless explained. We are now in a position to understand the true meaning of the passage contained in the auditors' report to the directors of February 3, 1892, and which runs thus: 'We cannot conclude without expressing our opinion unhesitatingly that no dividend should be paid this year.' I find it impossible to treat this as a statement by the auditors that there are profits divisible amongst the shareholders, but that the auditors cannot recommend a dividend. I can only regard the passage as meaning that there are no funds out of which a dividend can properly be paid, and therefore no dividend ought to be paid this year. A dividend of

7 per cent. was, nevertheless, recommended by the directors, and was resolved upon by the shareholders at a meeting furnished with the balance-sheet and profit and loss account certified by the auditors, and at which meeting the auditors were present, but silent. Not a word was said to inform the shareholders of the true state of affairs. It is idle to say that these accounts are so remotely connected with the payment of the dividend as to render the auditors legally irresponsible for such payment. The balance-sheet and account certified by the auditors, and showing a profit available for dividend, were, in my judgment, not the remote, but the real operating cause of the resolution for the payment of the dividend which the directors improperly recommended. The auditors' accounts and certificate gave weight to this recommendation, and rendered it acceptable to the meeting. It was wholly unnecessary for the official receiver to call a shareholder to say that he was induced by the auditors' certificate to concur in the resolution to pay a dividend. As to this part of the case, *res ipsa loquitur*."

Lord Justice Rigby added: "That the dividend was in fact paid out of capital cannot, I think, admit of doubt. It was, indeed, argued that before the stoppage of the bank the profits entered in the 1891 balance-sheet were in fact paid by appropriation of moneys paid in to the current accounts. This would not apply to a case like *Wilkinson's*, where there was no live account; but, in my judgment, the rule in *Clayton's Case* (b) has no sort of application under the circumstances. If it had, a bank might always pay profits by mere book entries, though the customers against whom interest and commission were charged might all be hopelessly insolvent."

But an auditor is not bound to be suspicious where there are no circumstances to arouse suspicion. It is no part of his duty to take stock. He may rely upon other people for details of the stock-in-trade on hand. He is only bound to exercise a reasonable degree of care and skill.

(b) (1816), 1 Mer, 572. See Part II. Chap. 4.

In *In re Kingston Cotton Mill Co.* (No. 2) (c) for some years before the company was wound up, balance-sheets signed by the auditors were published by the directors to the shareholders in which the value of the company's stock-in-trade at the end of each year was grossly overstated. The auditors relied on certificates, wilfully false, given by J., one of the directors who was also manager, as to the value of the stock-in-trade. Dividends were paid for some years on the footing that the balance-sheets were correct; but if the stock-in-trade had been stated at its true value it would have appeared that there were no profits out of which a dividend could be declared. If the auditors had compared the different books, and added to the stock-in-trade at the beginning of the year the amounts purchased during the year, and deducted the amounts sold, they would have seen that the statement of the stock-in-trade at the end of the year was so large as to call for explanation; but they did not do so. It was held that, it being no part of the duty of the auditors to take stock, they were justified in relying on the certificates of the manager, a person of acknowledged competence and high reputation, and were not bound to check his certificates in the absence of anything to raise suspicion, and that they were not liable for the dividends wrongfully paid.

In giving judgment, Lindley, L. J., pointed out that the duty of an auditor generally had been very carefully considered in the case last cited, and observed that he could not usefully add anything to what might be found there. After dealing with the facts in the present case, he continued: "The question is whether, no suspicion of anything wrong being entertained, there was a want of reasonable care on the part of the auditors in relying on the returns made by a competent and trusted expert relating to matters on which information from such a person was essential. I cannot think there was. The manager had no apparent conflict between his interest and his duty. His position was not similar to that of a cashier who has to account for the cash which he receives, and

whose own account of his receipts and payments could not reasonably be taken by an auditor without further inquiry."

"Auditors," said Lopes, L. J., "must not be made liable for not tracking out ingenious and carefully laid schemes of fraud when there is nothing to arouse their suspicion, and when those frauds are perpetrated by tried servants of the company and are undetected for years by the directors. So to hold would make the position of an auditor intolerable" (*d*).

Position.

An auditor may or may not be an "officer" of a company (*e*).

Where he is appointed by a banking company in pursuance of sect. 7 of the Companies Act, 1879 (*f*), and is referred to as an officer in the articles of association (*g*); or is otherwise appointed to the office of auditor to a company, and acts in that office, he will be "an officer" within sect. 10 of the Companies (Winding-up) Act, 1890, and in case the company is wound up he will be liable to a misfeasance summons under that section in respect of dividends declared upon the faith of his audit (*h*); and no irregularity in his appointment will avail him as a defence. Seeing, however, that the word "auditor" does not occur in the section, the performance of auditor's work upon a given occasion by a person who has never been appointed to the office of auditor of the company, does not make that person an "officer" of the company, so as to render him liable under the section (*i*).

If an auditor is not an officer, or if, although he is, the company is not being wound up, a liability on his part must be enforced in an action by the company against him (*k*).

(*d*) Cf. *Dovey v. Cory*, cited at p. 51, *supra*; and *Leeds Estate Building, &c. Co. v. Shepherd*, cited at p. 54, *supra*.

(*e*) In practice he usually is.

(*f*) See p. 30, *supra*.

(*g*) *In re London and General Bank*, [1895] 2 Ch. 166.

(*h*) *In re Kingston Cotton Mill Co.*, [1896] 1 Ch. 6.

(*i*) *In re Western Counties Steam Bakeries and Milling Co.*, [1897] 1 Ch. 617.

(*k*) See *Leeds Estate Building, &c. Co. v. Shepherd*, cited at p. 54, *supra*; and *Lindley on Companies*, 6th ed. p. 618.

CASHIER.

"The cashier holds the money of the bank with a general authority from the bank to deal with it. He has authority to part with it on receiving what he believes to be a genuine order. Of the genuineness he is the judge" (l).

Accordingly it was held, in a criminal case (m), that if he parts with money under a mistake induced by a false pretence, he none the less intends to part with the property in it, and thus the offence committed by the person obtaining the money is not larceny but obtaining by false pretences.

Usually a payment made by a cashier at the bank will amount in law to a payment by the bank. But circumstances may exist under which this will not be so. Thus, in *Foster v. Green* (n), C., the cashier of the plaintiff, a banker, being indebted to the defendant, the latter applied to C. at the bank for payment. C. handed him the amount in money of the plaintiff's, and obtained the defendant's signature to a cheque for the amount, the defendant receiving the money, believing it to be in payment of the debt due to him from C., and signing the cheque believing it to be a receipt to C. The transaction was entered in the bank books as a loan from the plaintiff to the defendant upon the cheque. It was held that the plaintiff was not entitled to recover.

CLERK.

"Both in a joint-stock and in a private bank, every one employed, whether he is called manager or secretary, in reality is nothing more than a clerk; and heads of the separate departments may properly be called chief clerks" (o).

Accordingly, although a manager differs widely in the scope of his authority from a clerk in the ordinary acceptance of the term, he has been held to be a chief clerk within the meaning of the

(l) Per Blackburn, J., in *Reg. v. Prince* (1868), L. R. 1 C. C. R. 150.

(m) *Reg. v. Prince*, see last note.

(n) (1862), 31 L. J. Ex. 158.

(o) Per Kelly, C. B., delivering the judgment of the Court in *Reg. v. Greenland* (1867), L. R. 1 C. C. R. 65, at p. 69.

9 Geo. 4, c. 23, s. 7, which requires an affidavit verifying the return of the issue by a banker of unstamped bills and notes to be made by a cashier, accountant, or chief clerk (*p*).

But in most connections a "clerk" signifies a subordinate employee whose authority is limited by the particular functions which he is appointed to discharge.

That these functions may vary from time to time, and that the liability of the banking company for his acts will depend upon the nature of his employment for the time being, may be gathered from the case of *Melville v. Doidge* (*q*).

The fraud of a clerk in connection with a transaction not coming within the scope of his duties will not render the company by which he is employed liable in respect of its consequences to a third party.

Thus, in *In re Royal British Bank, Ex parte Frowd* (*r*), a clerk in a joint stock bank, while in F.'s coffee-house, stated to him that the bank with which he was connected was in a very flourishing condition. It was held that, even if the statements made were fraudulent and induced F. to become a shareholder, they could not be considered as representations by the company. Nor could they have been so considered even if they had been made in the bank itself. "It was not," said Kindersley, V.-C., "his duty or function to make a report."

Compulsory Resignation.—An employee who is required to resign his appointment, and does so accordingly, does not retire "with the consent of the directors," within the meaning of a rule providing that employees so retiring shall receive a pension or allowance (*s*). The use of polite instead of peremptory language does not prevent a compulsory resignation being in fact a dismissal (*t*).

(*p*) *Reg. v. Greenland*, see last note.
Cf. *Anderson v. Thornton* (1842), 3 Q. B. 271, cited at p. 77, *infra*.

(*q*) (1848), 6 C. B. 450, cited at p. 74, *infra*.

(*r*) (1861), 3 L. T. 843; 9 W. R. 328.

(*s*) *Stephenson v. London Joint Stock Bank* (1902), 19 T. L. R. 138; 20 T. L. R. 8.

(*t*) See per Lord Chancellor Halsbury at p. 9 of the report in 20 T. L. R. of the case cited in the last note.

GUARANTEES FOR FIDELITY.

The principles governing the contract of suretyship or guarantee generally are discussed subsequently in Part VIII. Chap. 5.

It will, however, be convenient here to refer to the subject of guarantees for fidelity.

Preliminary Disclosure.

The banker should take care that the surety is informed of every circumstance calculated to render the risk which he runs greater than he would otherwise naturally anticipate.

In *Smith v. Bank of Scotland* (u) the bank, in taking a guarantee for the good behaviour of a clerk, had not disclosed to the surety the fact that the clerk had previously misconducted himself in his office. It was, in effect, held that this omission vitiated the contract of suretyship. "If," said Lord Eldon, "a man found that his agent had betrayed his trust, that he owed him a sum of money, or that it was likely he was in his debt, if under such circumstances he required sureties for his fidelity, holding him out as a trustworthy person, knowing, or having ground to believe, that he was not so, then it was agreeable to the doctrines of equity, at least in England, that no one should be permitted to take advantage of such conduct even with a view to security against future transactions of the agent."

This case was followed in *Railton v. Mathews* (x), where Lord Campbell said: "If the defenders had facts within their knowledge which it was material the sureties should be acquainted with, and which the defenders did not disclose, in my opinion the concealment of those facts—the undue concealment of those facts—discharges the surety" (y).

(u) (1813), 1 Dow, 272.

(x) (1844), 10 Cl. & F. 934.

(y) Both these cases are referred to in

the judgments in *North British Insurance Co. v. Lloyd* (1854), 10 Ex. 523; and *Phillips v. Foxall* (1872), L. R. 7 Q. B. 666.

Subsequent Disclosure.

In *Phillips v. Forall* (z) it was held that, in the case of a continuing guarantee for the honesty of a servant, if the master discovers that the servant has been guilty of dishonesty in the course of the service, and instead of dismissing the servant, he chooses to continue him in his employment without the knowledge and consent of the surety, express or implied, he cannot afterwards have recourse to the surety to make good any loss which may arise from the dishonesty of the servant during the subsequent service (a).

Scope of the Guarantee.

A guarantee for the good behaviour of an employee will extend to such acts and defaults as, according to the terms of the contract and the circumstances of the case, must be taken to have been within the contemplation of the parties. Thus, if the guarantee is either expressly or in fact given in consideration of his appointment to a particular office, it will extend only to his behaviour while employed in that office, unless it expressly provides otherwise.

Whether, at the time when the wrongful act or default was committed, he was employed in a particular office, is a question to be decided having regard to the substance of the case, and not to mere technical or verbal incidents. No burden will be thrown upon the surety which he must not fairly be taken to have contemplated; but, on the other hand, the usual course of business and the real nature and object of the guarantee must be regarded.

In *Melville v. Doidge* (b) the defendant had entered into a bond, as surety, for the due and faithful performance by one C. of his duty as clerk to a provincial bank. C. being sent by the manager of the bank, at the request of a customer, to his residence, about eleven miles distant from the bank, for the purpose of receiving a large sum of money to be placed to his account—a considerable

(z) (1872), L. R. 7 Q. B. 666.

(a) This case was followed in *Sanderson v. Aston* (1873), L. R. 8 Ex. 73; 42

L. J. Ex. 64; 28 L. T. 35; 21 W. R. 293.

(b) (1848), 6 C. B. 450,

portion of it being in gold and silver—on his way back dropped the money from his pocket, and lost it. It was held that the money was received by C. in the course of his employment as clerk to the bank; that the defendant was liable as surety, notwithstanding the finding of the jury that it was not the custom for bankers in that part of the country to send for their customers' money in the manner adopted; and that the loss of the money was *prima facie* evidence of gross negligence on the part of C.

Chief Justice Wilde, in the course of his judgment, said: "It is said that the receipt of the money by Chidley was not a receipt by him in the course of his employ, as clerk to the bankers, but that he was rather to be considered as acting on the occasion in question as the agent or servant of Dayman, the customer. That, as it strikes me, is not a correct view of the case. The facts are these:—Dayman, a customer of the bank, residing at a place distant about eleven miles from Bideford, applies to the bank for some extra accommodation, requesting them to send a trustworthy person to receive from him a large sum of money to be deposited with the bank. Accordingly, a clerk is sent over for the purpose, and the money is handed to him. Under these circumstances, it is precisely the same as if one of the partners, or the manager himself, had gone to fetch the money. When the money was so received by Chidley, it clearly came to his hands in the course of his employment as clerk. It is true the jury have found that the transaction was out of the ordinary course of banking business, as conducted in the west of England. But it seems to me that the receipt of this money was not the less a receipt by Chidley in the course of business, because in that particular part of the country bankers are not in the habit of doing as was done here. The main question is—was the money received by the bank, to be retained and employed by them as the bankers of Dayman? Most certainly it was. It is next said that the money never in fact became the money of the bankers, but that it remained Dayman's money until it actually reached Bideford. That is pretty much the same question. If Chidley received it as clerk to the bank, the receipt by him was a receipt by the bank. I do not think the verdict passed on the ground of any supposition

of want of integrity on the part of Chidley. There was no imputation on him further than a suspicion that he had been guilty of an indiscretion which he did not think fit to disclose. The case was peculiarly one for the jury. They have exercised their discretion upon it; and it is not pretended that any further light would be thrown upon the matter by a further investigation. I certainly was not dissatisfied with the verdict; neither should I have been so had it been the other way; but I see no ground for saying that the conclusion the jury came to was a wrong one, or that the presumption that it was so, is strong enough to justify the Court in granting a new trial." Maule, J., added: "It certainly is pretty strong evidence of negligence, that a man has 447*l.* in his pocket, and loses it." The rest of the Court concurred.

Variation in Terms of Employment.—A variance in the agreement to which a surety has subscribed, which variance has been made without the surety's knowledge or consent, and which may prejudice him, or amount to the substitution of a new agreement for a former one, will discharge the surety, though the original agreement, notwithstanding such variance, may be that on which the liability is substantially incurred.

In *Bonar v. Macdonald* (c) A. became surety for B.'s conduct as a clerk in a bank. B. was subsequently appointed to a better situation in a branch of the same bank, and A. extended his suretyship to this new situation. B. afterwards, while remaining in the same situation, undertook, on having his salary raised, to become liable to one-fourth of the losses on discounts. No communication of this new arrangement was made to A. B. allowed a customer considerably to overdraw his accounts, and thereby the bank lost a sum of money. It was held that the surety could not be called on to make good this loss, though it fell within the terms of the original agreement, as the fresh arrangement was the substitution of a new agreement for the former one, and A. was thereby discharged.

So, where a surety has become bound for the faithful conduct of

(c) (1850), 3 H. L. C. 226. This was the laws of England and Scotland were a Scotch appeal; but it was held that the same upon the subject in question.

an employee whom the obligee agrees to appoint at a certain salary, and an uncertain remuneration by way of commission is substituted, the surety is discharged (*d*).

But it is otherwise if a salary is slightly reduced, where there is nothing amounting to a bargain between the surety and the employer that the salary shall be continued unchanged (*e*).

The case of *Anderson v. Thornton* (*f*) turned upon a point of pleading; but it may be gathered from the decision that the Court were of opinion that a guarantee for the fidelity of a clerk would not necessarily cease to be applicable upon his appointment as manager. Lord Denman, C. J., delivering the judgment of the Court of Queen's Bench, said: "This was an action of debt on bond. The defendant, after craving oyer of the bond, which recited that one C. G. Rees had been appointed one of the clerks of a banking company, and was conditioned for his fidelity, &c., whilst in the service of the company, pleaded, in substance: that before any breach of the condition, to wit, on the 1st of January, 1836, Rees was appointed manager; that the office of manager is different from that of a clerk, and the responsibilities greater; that Rees did, from the day and year aforesaid, cease to be clerk of the company, and that he performed the condition whilst he was clerk, and before he was appointed manager. To this plea there was a demurrer; and upon the argument two points were insisted upon for the plaintiffs. First, that the condition of the bond is not limited to service by Rees as clerk only, but extends to any other employment of Rees in the service of the company. Secondly, that it does not appear by the plea that Rees ceased to perform the service of a clerk to the company upon his being appointed manager; and consequently that a plea of performance until he was appointed manager is insufficient. Upon the first of these objections it is unnecessary to give any opinion, as we think the second must prevail, and that the plea is bad for not alleging

(*d*) *North Western Rail. Co. v. Whinray* (1854), 10 Ex. 77; 2 C. L. R. 1207; 23 L. J. Ex. 261.

(*e*) *Frank v. Edwards* (1852), 8 Ex. 214;

22 L. J. Ex. 42; distinguished in the preceding case by Platt, B., at p. 82 of the report in 10 Ex.

(*f*) (1842), 3 Q. B. 271.

that Rees ceased to be clerk of the company when he was appointed manager. It is perfectly consistent with the allegations in this plea, that Rees continued to be clerk after he was appointed manager; and the performance ought not to have been limited to the time of his being appointed manager. The plea, if put in issue, would have been supported by proof that Rees had been appointed manager on some day previous to the day stated in the plea, (the time being laid under a *videlicet* and not material,) and that he ceased to be a clerk on the day stated in the plea, or some subsequent day, leaving an interval between the appointment to be manager and the ceasing to be clerk; it not being alleged in the plea that he ceased to be clerk when he was appointed manager, and it not appearing that the offices are necessarily inconsistent. There may, therefore, have been an interval during which a breach occurred, which is not covered by the plea: and we are therefore of opinion that the plaintiffs are entitled to judgment" (g).

The Default.

Whether the employee has defaulted within the terms of the guarantee will be a question of construction and of fact.

Where the surety has guaranteed the payment over by an official of all balances and moneys due to his employers he will be liable if money has in effect passed to the official which is due to his employers and has not been paid over (h).

But if the money has been lost by *vis major* or by robbery, without any fault on the employee's part, the surety will not be liable (i).

Where an account is delivered by a clerk or agent, in which he charges himself with a balance, and he continues to receive moneys for his principal, his subsequent payments are not necessarily to be

(g) See also *Holme v. Brunskill* (1877), 3 Q. B. D. 495; *Croydon Commercial Gas Co. v. Dickinson* (1876), 2 C. P. D. 46; *Skillett v. Fletcher* (1867), 2 C. P. 469.

(h) *Pattison v. Guardians of Belford*

Union (1856), 1 H. & N. 523; 26 L. J. Ex. 115; 3 Jur. N. S. 116.

(i) *Walker v. British Guarantee Association* (1852), 18 Q. B. 277; 21 L. J. Q. B. 257; 16 Jur. 885.

first applied to the extinction of the previous balance, when the subsequent receipts are equal to the subsequent payments (*k*).

In an action upon the guarantee, entries of the receipt of sums of money made by the clerk in books kept by him in the discharge of his duty as clerk, are, after his death, evidence against his sureties of the fact of the receipt of the money (*l*).

Duration of Guarantee.

In the case of a guarantee of this kind, given, as it usually is, in consideration of the appointment of the person whose fidelity is guaranteed to an office by the party to whom the guarantee is given, it will not, unless expressly so stipulated in the guarantee, be determined by the death of the surety or determinable by notice.

In *In re Crace, Balfour v. Crace* (*m*), Mr. Justice Joyce said : "The right to determine or withdraw a guarantee by notice forthwith cannot possibly exist, in my opinion, when the consideration for it is indivisible, so to speak, and moves from the person to whom the guarantee is given once for all, as in the case of the consideration being the giving or conferring an office or employment upon any person whose integrity is guaranteed. It is impossible that the guarantor should be entitled by notice, unless he has expressly so stipulated, to determine that guarantee instantaneously. Time must be allowed—at all events, it is admitted that some time must be allowed—for a lawful determination of the employment by the person to whom the guarantee is given, and I think, with reference to a guarantee of the nature which we have to consider in the present case, many other considerations are applicable besides merely a lawful determination of the employment by giving six months' notice, or something of that kind. As I said in the course of the argument, six months' notice might determine the employment just in the midst of the audit or receipt of the rents ;

(*k*) *Lysaght v. Walker* (1831), 5 Bligh, N. S. 1.

(*l*) *Whitnash v. George* (1828), 8 B. & C. 556.

(*m*) [1902] 1 Ch. 733.

or the employer might be placed in such a position with reference to the person employed that it might be most inadvisable and injurious to him to put an immediate end to the employment. If, however, such a guarantee can be determined by notice at all, the question what length of notice the employer must necessarily be entitled to, I think, has not been determined, and must depend upon the circumstances of the particular case. Now, that being so, there is no difficulty whatever, to my mind, in answering the question which was argued before me as it originally stood. It would have been impossible to hold that, with respect to this guarantee, where there is no stipulation to the contrary, the liability of the guarantor under the bond was determined immediately, either on the death of the guarantor or on the fact of his death coming to the knowledge of the person to whom the guarantee was given. But I am told that that is not the real question, and it was proposed to alter the question in a form which was partly suggested by myself, and the question I have to decide is whether the liability, if any, of Mr. Crace under the bond was determined, immediately or otherwise, by the mere fact of his death coming to the knowledge of the plaintiff. Now, whatever the true answer to that question may be, and whether such a guarantee as this can be determined by notice or not, I certainly agree with what Romer, J., says in *In re Silvester* (n), where he observed on Lord Bowen's decision in *Coulthart v. Clementson* (o): 'I desire to add that I do not assent to the general proposition that, where a person who is himself entitled to the benefits of a contract of guaranty, has notice of the death of the guarantor and that he left a will, he is, without more, affected with notice of the contents of the will, or is bound to assume that *prima facie* it would be a breach of trust on the part of the executor not to give notice to determine the liability.' I desire to express my entire agreement with that, whatever the proper answer be to the question whether such guarantee as that which we have to consider in this case can be determined by notice or not. Really what we have to decide is this—whether, when the guarantee is of this kind, given as part of the consideration for the

(n) [1895] 1 Ch. 573, 577.

(o) (1879), 5 Q. B. D. 42.

appointment to an office or employment of a person by another to whom the guarantee is given, the law requires the guarantor, in case he desires the guarantee to be determinable by notice or by his death, to have it expressly so stipulated, or does the law require the person to whom the guarantee is given to have it expressly so stipulated if the guarantee is not to be determined by notice or by the death of the guarantor? Well, after listening to the argument and giving some consideration to the case, I have come to the conclusion that, upon the whole, where an office or employment is conferred in consideration of such a guarantee as that in this case, it is safer to hold that the guarantor must expressly so stipulate or provide if he desires the guarantee to be determinable by notice, or to be determined by his own death. And in coming to that conclusion I rely on *Gordon v. Calvert* (*p*), and also upon what I understand to be the reasoning of the Lords Justices in *Lloyd's v. Harper* (*q*), although I have not forgotten that there was a special fact in that case, namely, that the person whose integrity was there guaranteed was in what was analogous to employment which could not be determined by Lloyd's" (*r*).

For further information upon the subject of guarantees reference should be made to Part VIII. Chap. 5.

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| <p>(<i>p</i>) (1828), 2 Sim. 253; 4 Russ. 581;
 23 R. R. 94; 3 Man. & R. 124.</p> <p>(<i>q</i>) (1880), 16 Ch. D. 290.</p> <p>(<i>r</i>) As to the continuance of a surety's</p> | <p>liability on a bond guaranteeing the true
 accounting by a clerk, even after notice,
 see <i>Gordon v. Calvert</i>, referred to in
 note (<i>p</i>), <i>supra</i>.</p> |
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CHAPTER V.

BRANCHES.

Legal Position.

THE head office and all its branches constitute together only one corporation or firm; but each branch is a separate agency of the common principal.

The essential identity of the head office and its several branches was emphasised by Tindal, C. J., in *Robertson v. Sheward* (a), where he said: "It appears that there is a bank called the National Provincial Bank of England, having its principal establishment in London, with branches in different parts of the country, not distinguished by any separate name, but all or in (b) part of the same undertaking, as if a banker in London were to hire rooms in a distant market town, and transact business there by a clerk on market days."

The character of branch banks as separate agencies of a common principal is pointed out by Sir Montague Smith in *Prince v. Oriental Bank Corporation* (c), where he says: "In principle and in fact they are agencies of one principal banking corporation or firm."

Transactions between Branches.

The legal unity of the various branches is illustrated by the effect of payments and drafts made or addressed by one to another.

(a) (1840), 1 M. & G. 511.

(b) *Sic.*

(c) (1878), 3 A. C. 325, at p. 332.

Remittances.—In *Prince v. Oriental Bank Corporation* (d) a promissory note was returned dishonoured to the plaintiffs after the amount had been transmitted, by transfer drafts and entries in the bank's books, from the branch where the same was made payable to the branch where the plaintiffs paid the same in, such drafts and entries not having been communicated to the plaintiffs. It was held that the bank could not be charged with the receipt of the money.

"If," said Sir Montague Smith, delivering the judgment of the Judicial Committee, "they had been separate and distinct banks, it may be that the remittance by the Murrumburrah Bank to the bank at Sydney of this draft to be put to the credit of the New South Wales Bank, would, if so accepted, have been equivalent to a receipt on the part of the Sydney Bank of money from the Murrumburrah Bank to be held for the New South Wales Bank. But the difficulty of the plaintiffs' case is that these banks are not separate and distinct banks, but branches of one and the same banking corporation or establishment. They are, indeed, separate agencies, but agencies of one principal, that principal being the corporation of the Oriental Bank. How, then, are the defendants liable? They have not received the money, nor anything equivalent to money, from any source outside their own establishment. Supposing the Murrumburrah branch had sent money from their till to the branch at Sydney, whose money would it have been? Surely the money of the Oriental Bank. It would have gone from the till at Murrumburrah to the till at Sydney, but would remain, notwithstanding the transfer, the bank's own money. Then, if so, the remittance of the draft and the entries, which at most are only equivalent to a transfer of money, and might be so as between distinct banks, cannot have greater effect than an actual transfer of money. They are entries and transactions only by and between the respective officers of the same bank. If these transactions had been communicated to the New South Wales Bank or to the plaintiffs, it may be that the Oriental Bank would have been estopped from saying that they did not hold the money to the account of the plaintiffs or of the New South Wales Bank. But

(d) At p. 330 of the report referred to in the last note.

no such communication was made; and before anything was known beyond the walls of the bank itself, the order given by the officer at Murrumburrah to the Sydney Bank to credit the New South Wales Bank was cancelled and withdrawn, and the memorandum 'cancelled in error' was made upon the note. The first thing that the plaintiffs or the New South Wales Bank hear or know, is that the note is dishonoured."

Drafts by one Branch on Another.—A banker's draft payable to order on demand, addressed by one branch of a bank to another branch of the same bank and not crossed, is not a cheque within the meaning of sects. 60 or 82 of the Bills of Exchange Act, nor is it within sect. 17 of the Revenue Act, 1883. But it is within sect. 19 of the Stamp Act, 1853, which protects bankers *bonâ fide* paying such drafts to holders claiming under forged indorsements (e).

As to the position where a crossed cheque drawn upon one branch is collected by another, see Part V. Chap. 9.

Payment of Cheques.

Cheque drawn on one Branch presented at Another.—In the absence of express agreement, a banker is only bound to recognise a balance in favour of his customer at the office upon which his cheque is drawn.

A customer who keeps his account at a branch has the right of drawing cheques upon that branch only. He has no right to have his cheque paid at any other branch or at the head office. From the nature of the case the undertaking on the part of the banker implied by opening the account must be limited in this way. "It would be difficult for a bank to carry on its business by means of various branches if a customer who kept his account at one branch might draw cheques upon another branch, however distant from that at which he kept his account, and demand that they should be cashed there. The latter branch could not possibly know the state of his account" (f).

(e) *Capital and Counties Bank v. Gordon*, [1903] A. C. 240.

(f) Per Sir Montague Smith in the above-cited judgment in *Prince v. Oriental Bank Corporation* (1878), 3 A. C. 325.

Accordingly, if a cheque drawn on one branch is in fact cashed by another, the latter does not act in the matter of cashing it as the bank of the drawer, but is held to rely upon the credit of the person presenting it.

In *Woodland v. Fear* (*g*) a cheque drawn upon the G. branch of a bank by H., who kept an account at that branch, was presented by the defendant at the B. branch of the same bank, where it was cashed in the usual way across the counter, and the same day sent to the G. branch. H. having no funds there, it was returned to the B. branch, who gave notice of dishonour to the defendant. H. had no account with the B. branch; and the two branches were distinct in respect of the accounts kept there, and issued cheques denoting the particular branch upon which they were drawn. It was held that this did not amount to payment of the cheque by the B. branch, as the bankers of H. or on his credit, but on the credit of the defendant, and that, the cheque proving to be worthless, the bank was entitled to recover back the money paid.

Lord Campbell, delivering the judgment of the Court, said: "The plaintiff insisted that as regarded the separate customers, the different establishments were in the nature of separate companies, that Helyar kept no account at Bridgwater, could draw no cheques on that establishment, and that he and it did not stand in the relation of banker and customer, that the cheque in question therefore must be considered as having been cashed not on Helyar's credit, or by his agent, but on the credit of the defendant, and that as there was no laches on the part of the Bridgwater establishment, the case was precisely within the authority of *Timmins v. Gibbins* (*h*). It appears to us that this is the true view of the case. To hold that the customer of one branch, keeping his cash and account there, has a right to have his cheques paid at all or any of the branches is to suppose a state of circumstances so inconsistent with any safe dealing on the part of the banker, that it cannot be presumed without direct evidence of such an agreement, and the

(*g*) (1857), 26 L. J. Q. B. 202; 7 El. & Bl. 519.

(*h*) (1852), 18 Q. B. 722.

giving on the one hand, and accepting on the other, of a limited cheque-book, seems intended to guard against such an inference."

Customer having Accounts at Two Branches.—On the other hand, a banker to whom a cheque is presented at the branch upon which it is drawn is entitled to take into consideration a balance against the drawer on an account at another branch, and to dishonour the cheque if the resulting balance is insufficient to meet it.

This follows from the fact that the banking firm or company, including all the branches, are but one firm or corporation. For, whether the latter is indebted, and to what extent, to a particular customer, depends upon the balance on all the accounts between them; and, except in so far as that balance is in favour of the customer, there is no obligation to pay money to him, or his order, either by honouring his cheque or otherwise.

In *Garnett v. M'Kewan* (i) the plaintiff, having an account at the L. branch of the defendant's bank, which showed a balance to his credit exceeding 23*l.*, drew cheques to that amount on that branch. At the same time he was indebted to the bank at their B. branch in an amount which, having regard to both accounts, reduced his assets in the bank's hands to a few shillings only. The bank, without any notice to him, transferred the B. debt to the L. branch, and refused to pay the cheques on presentment. There was no special contract between the parties that each account should be kept separate. It was held that the bank was entitled at any time to combine the accounts, and to charge the L. account with the B. debt.

Referring to this case, Sir Montague Smith said, in the course of his judgment above referred to: "The principle of that decision affirms the identity of the bank and its several branches; though separate agencies, the latter were still agencies of one principal bank, with which alone the plaintiff contracted. Acting upon this principle, the Court held that the money of the plaintiff lodged at one branch, and being still there to the credit of his account, was to be treated as part of the customer's entire account with the

(i) (1872), L. R. 8 Ex. 10.

bank, and that the whole account was to be looked at to see on which side as between him and the bank the balance stood."

Notice of Dishonour.

For the purpose of estimating the time at which notice of dishonour should be given, each branch must be regarded as distinct both from the head office and other branches.

"With regard to the giving of notice agents are treated successively as if they were holders" (*k*).

In *Clode v. Bayley* (*l*) a bill of exchange was indorsed to a branch of the National Provincial Bank of England at Portmadoc. The latter sent it to the Pwllheli branch of the same bank, and they indorsed it to the head establishment in London. It was held that each of the branches was entitled to the usual notice of dishonour.

Sir Montague Smith, in *Prince v. Oriental Bank Corporation* (*m*), referring to this case, said: "It was held that for the purpose of estimating the time at which notice of dishonour should be given, the different branches were for that purpose to be regarded as distinct. In considering whether notice of dishonour was given in time, it was thought reasonable that the bill should be sent successively to the branch banks through which it had come to the principal bank, before giving the notice. It was pointed out by Lord Abinger that it was not possible for the bank in London to know from whom the bill came; therefore it was necessary, in the ordinary course of the transaction of business, that it should be sent to the branches before notice of dishonour could properly be given."

It is to be observed that Blackburn, J., apparently intending to allude to *Clode v. Bayley*, in *In re Brown v. London and North Western Railway Co.* (*n*), said: "If there had been at each place only a clerk or a servant—not managing a separate business at all—

(*k*) Per Rigby, L. J., in *Fielding & Co. v. Corry*, cited at p. 88, *infra*.

(*l*) (1843), 12 M. & W. 51.

(*m*) At p. 332 of the report.

(*n*) (1863), 4 B. & S. 326, at p. 337.

still each as a separate holder of the bill would be entitled to hand it on to the next: for the purpose of notice of dishonour it is enough that the bill comes into separate hands."

Clode v. Bayley and the above-quoted observations of Sir Montague Smith with regard to that case were cited with approval by Collins, L. J., in his dissenting judgment in *Fielding & Co. v. Corry (o)*, and it is conceived that they correctly represent the law. The majority of the Court of Appeal decided the last-mentioned case upon a ground which did not involve any disagreement upon this point.

There a branch of a country banking company received from a customer a bill of exchange and forwarded it to a London bank for presentation. The bill was dishonoured, and the London bank on the following day sent notice of dishonour by post to a branch of the country banking company, but not to the branch from which they had received the bill. On the next day they discovered the mistake, and telegraphed notice of dishonour to the branch from which they had received the bill. The notice given by that branch, and all subsequent notices, including that to the defendant, who was an indorser of the bill, were sent in due time. In an action by the holder of the bill, it was held by A. L. Smith and Rigby, L. JJ., that sufficient notice of dishonour had been sent by the London bank to comply with the provisions of s. 49, sub-ss. 12, 13, of the Bills of Exchange Act, 1882; but Collins, L. J., held that, for the purpose of notice of dishonour, the branches of a bank must be regarded as distinct, that the written notice by the London bank, not having been sent to their principals, was ineffective, and could not be made effective by the telegram, which was out of time.

Notice Generally.

As to notices other than notices of dishonour, it would appear that notice to the head office or to a branch of any fact which it would be the duty of that office or branch to communicate to its branches or

to the head office, as the case may be, would, after the lapse of a reasonable time for such communication, be equivalent to a notice to the particular branch or head office concerned.

Thus, in *Willis v. Bank of England* (*p*), a notice of an act of bankruptcy by the holder of a bill given to the head office of the Bank of England was held, after the lapse of a reasonable time for transmitting it to a branch office, to be equivalent to a notice to the latter.

“The general rule of law,” said Lord Denman, C. J., “is that notice to the principal is notice to all his agents at any rate if there be reasonable time, as there was here, for the principal to communicate that notice to his agents before the event which raises the question happens. We have been pressed with the inconvenience of requiring every trading company to communicate to their agents everywhere whatever notices they may receive; but the argument *ab inconvenienti* is seldom entitled to much weight in deciding legal questions, and if it were, other inconveniences of a more serious nature would obviously grow out of a different decision.”

(*p*) (1835), 4 A. & E. 21.

CHAPTER VI.

AGENTS AND CORRESPONDENTS.

Position of Customer.

WHERE a customer employs his banker in a matter which involves the further employment of an agent or correspondent of the latter, in the absence of express agreement upon the subject, there will be no privity between the customer and the agent or correspondent.

The customer's rights will be, not against the correspondent (*a*), but against his own banker.

Thus, where a banker, acting as collecting agent for his customer, employs a correspondent in the transaction, the banker is responsible to his customer for the default of his correspondent. This is so although the employment of the correspondent is necessary, and is contemplated by the customer when he instructs his banker in the matter.

This was decided in *Mackersy v. Ramsays* (*b*). Lord Campbell, delivering judgment in the House of Lords in that case, said: "It appears that Ramsay & Co., in the way of their business as bankers, were employed for reward by a customer, with whom they had a cash account, to obtain payment of a bill of exchange drawn on a person in Calcutta, payable to their order. They did not become the owners of the bill, or discount it, but they were to receive payment of it from Mackersy, having a lien on the bill and its proceeds for any balance due to them from him. The payment

(*a*) See the judgment in *Prince v. Oriental Bank Corporation* (1878), 3 A. C. 325, at p. 335, and the cases cited *infra* in this chapter.

(*b*) (1843), 9 Cl. & F. 818.

was to be made to persons to be employed by them, to whom the bill must be indorsed. Mackersy was not to interfere with the proceeds of the bill till he was credited, or entitled to be credited by them for its amount. They employed as their agents Coutts & Co., who employed Alexander & Co., who duly received payment from the acceptor, and having given Coutts & Co. credit in account, five months afterwards became bankrupt. I conceive that these circumstances amount, in point of law, to a payment to Ramsay & Co., and that they were bound to place the amount to the credit of Mackersy. The general rule of law, that an agent is liable for a sub-agent employed by him, is not confined to cases where the principal has reason to suppose that the act may be done by the agent himself without employing a sub-agent; and here I conceive that the money is to be considered as received by Coutts & Co., whose correspondents actually received it at Calcutta, and credited them with the amount five months before their failure. Mackersy could not have interfered with the money either in the hands of Alexander & Co. or of Coutts & Co. There was no privity between him and either of those houses; but payment to Alexander & Co. was payment to Coutts & Co., and payment to Coutts & Co. was payment to Ramsay & Co., the respondents. I approve of the expression of the Lord Ordinary, when speaking of the receipt of the money by Coutts' correspondents at Calcutta, that 'at that moment the law placed it to the credit of the defender.' The judges of the first division truly say that Ramsay & Co. had not become the owners of the bill. If by *vis major*, or *casus fortuitus*, the bill had been destroyed before it reached Calcutta, or if Clelland, the drawer, had become insolvent before it was paid, the loss would not have been theirs. But they might, nevertheless, be agents to receive payment, and be liable for the amount when payment had been actually received."

Lord Cottenham, after pointing out that the correspondence in the case, if it proved any special contract, established only such an agreement as the law would have inferred from the dealings between the parties, said: "The appellant, having an open cash account with Messrs. Ramsay, transmitted to them two bills, drawn by

himself upon Mr. Clelland, of Calcutta, and made payable to them. This is an authority to them to receive the money, which in the ordinary course of business they proceeded to do, and the money was paid in pursuance of the order. From the time the bills were sent to the pursuers, the appellant did not interfere. It was not intended that he should do so, nor indeed could he have done so, as none of the intended agents acted under his authority; he therefore had no control over them. All that Mackersy undertook to do by the bills has been accomplished. His debtor in Calcutta has, as directed, paid the sum for which the bills were drawn. In the ordinary course of business, therefore, the bankers to whom he delivered the bills, and to whom they were payable, were bound to credit him with the amount received, and by these letters they in effect agreed to do so. The money in the end was lost, not by any failure on the part of Mackersy or of the party who had by the bills been ordered to pay the amount to the bankers, the drawers, but by the insolvency of the person in Calcutta, who had actually received the proceeds of the bills. . . . Now, certainly, the present was not a case of discount, and there was no such special contract as is referred to by Lord Mackenzie (c); and it must have been known to the appellant that Messrs. Ramsay & Co. could not themselves go to Calcutta and receive the money. But none of these circumstances appears to me to be necessary in order to entitle the appellant to have credit with Messrs. Ramsay for the proceeds of those bills, actually paid by his debtor, the acceptor of the bills. I cannot distinguish this case from the ordinary transactions between parties having accounts between them. If I send to my bankers a bill or draft upon another banker in London, I do not expect that they will themselves go and receive the amount and pay me the proceeds; but that they will send a clerk in the course of the day to the clearing-house, and settle the balances, in which my bill or draft will form one item. If such clerk, instead of returning to the bankers with the balance, should abscond with it, can my bankers refuse to credit me with the amount? Certainly

(c) Lord Mackenzie had said that the case turned upon the point that the bankers had not agreed to take the bills as payment in India.

not. If the bill had been drawn upon a person at York, the case would have been the same; although, instead of the bankers employing a clerk to receive the amount, they would probably employ their correspondent at York to do so; and if such correspondent received the amount, am I to be refused credit because he afterwards became bankrupt whilst in debt to my bankers? If the balance were not in favour of my bankers, the question would not arise; so that my title to the credit would depend upon the state of the account between my bankers and their correspondent. The amount in money was received by the correspondent of my bankers at York; as between me and them, it was received by them, and nothing which might subsequently take place could deprive me of the right to have credit with them for the amount. If this be so in a transaction between London and York, it must be the same in one between Edinburgh and Calcutta, not by virtue of any special contract, but as resulting from the letters which raised the undertaking to procure payment of the bill, if it should be accepted and honoured, and to credit the proceeds. It was accepted and honoured, and the proceeds received by those employed for the purpose by them; and the appellant's title to credit for the amount was thereby perfected. If there was any negligence in the conduct of the parties actually employed to receive the money, it could only affect those by whom they were so immediately employed, for certainly they were not the agents of the appellant: over them he had no control. The money received by Alexander & Co. properly formed an item in the account between them and Messrs. Coutts & Co., their employers. If a larger balance had been due to them from Messrs. Coutts & Co. than the amount of the money so received, they would have been entitled to claim the whole, as in fact they did retain part. To solve the question in this case, it is not necessary to go deeper than to refer to the maxim *qui facit per alium facit per se*. Ramsay & Co. agreed, for consideration, to apply for payment of the bill; they necessarily employed agents for that purpose, who received the amount; the receipt was in law a receipt by them, and subjected them to all the consequences. The appellant, with whom

they so agreed, cannot have anything to do with the conduct of those whom they so employed, or with the state of the account between different parties engaged in this agency."

Conversely, a correspondent or agent who has been employed by another banker to accept on his credit bills drawn against consignments to a customer of the latter, has no right against the customer, but must look to his banker.

In *Barkworth v. Ellerman* (*d*) the defendant, a merchant at Hull, kept an account with the Hull bank, upon the terms that they should procure Price & Co., their London agents, to accept on their credit bills drawn by the foreign correspondents of the defendant against their consignments to him, and of which Price & Co. were advised by the Hull bank. The defendant paid the Hull bank a quarter per cent. on the amount of the acceptances, and they paid Price & Co. a fixed annual sum for transacting their London business. When a bill was accepted by Price & Co. the Hull bank debited the defendant with the amount, and they charged him interest from the time the bill was due. The Hull bank became bankrupt, and Price & Co. paid all bills accepted by them which were due after the bankruptcy. It was held that the assignees of the Hull bank, and not Price & Co., were entitled to recover from the defendant the amount of such bills.

Wightman, J., delivering the judgment of the Exchequer Chamber, said: "The evidence does not satisfy us, and ought not to have satisfied a jury, that there was any privity between Price & Co. and the defendant. The transaction was between the defendant and the Hull bank, who were to procure their London agent to accept the bills; and when they were accepted and paid it was, so far as the defendant was concerned, on the credit given to him by the Hull bank, and not by their London agent."

And if the customer has paid moneys to his banker which are remitted by him to his agent without specific appropriation to the purpose of meeting particular acceptances of the customer, and the banker fails, being indebted to his correspondent, the latter can retain the remitted moneys without meeting the acceptances (*e*).

(*d*) (1861), 6 H. & N. 605.

(*e*) *Johnson v. Robarts* (1875), 10 Ch. 505.

So where money due to a customer is paid into the account of his banker with the agent of the latter without specific appropriation, the agent will be accountable to the banker, and not to the customer.

In *Williams v. Deacon* (f) the plaintiff's broker, by his directions, was accustomed to pay his dividends into the defendant's bank, in London, to the plaintiff's credit in account with K. & Co., bankers at Abingdon, where the plaintiff resided. On the 14th October, 1847, the broker so paid into the defendant's bank 127*l.* 5*s.* 9*d.* On the 15th, and before advice of the receipt thereof, K. & Co. stopped payment. The plaintiff having sued the defendants for the sum so paid into their bank, the Court of Exchequer Chamber held that the payment into the defendant's bank was a payment to K. & Co., and that the defendants were entitled to a verdict.

"The question," said Mr. Justice Patteson, delivering the judgment of the Court, "depends upon the course of dealing between the parties. The plaintiff agrees with Knapp & Co. that the money shall be received by them from his broker, and that the broker shall pay it to them through the London bank—not that the specific ear-marked money which was paid in shall be sent. Then the moment the money is paid into the London bank, it is paid to Knapp & Co."

Questions as to whether or not there has been a specific appropriation of moneys or drafts to a particular purpose, and as to the property in drafts pending collection, have arisen in many cases where a correspondent or agent has been employed. These are dealt with in Part IV. Chap. 7, and Part V. Chap. 7.

Duty to Principal Bank.

An agent or correspondent bank is bound to show diligence and care in the matter in which it is employed, and liable, accordingly, for the consequences of its negligence (g).

(f) (1849), 4 Exch. 397.

Cf. also *Van Wart v. Woolley* (1824), 3 B. & C. 439; *Deutsche Bank (London Agency) v. Beriro & Co.* (1895), 1 Com. Cas. 255.

(g) See *Bank of Van Diemen's Land v. Bank of Victoria* (1871), 3 P. C. 526.

CHAPTER VII.

NAME AND REPUTATION.

Publication and Use of Name.

THE Companies Act, 1862, provides as follows :—

41. Every limited company under this Act, whether limited by shares or by guarantee, shall paint or affix, and shall keep painted or affixed, its name on the outside of every office or place in which the business of the company is carried on, in a conspicuous position, in letters easily legible, and shall have its name engraven in legible characters on its seal, and shall have its name mentioned in legible characters in all notices, advertisements, and other official publications of such company, and in all bills of exchange, promissory notes, endorsements, cheques, and orders for money or goods purporting to be signed by or on behalf of such company, and in all bills of parcels, invoices, receipts, and letters of credit of the company.

42. If any limited company under this Act does not paint or affix, and keep painted or affixed, its name in manner directed by this Act, it shall be liable to a penalty not exceeding five pounds for not so painting or affixing its name, and for every day during which such name is not so kept painted or affixed ; and, every director and manager of the company who shall knowingly and wilfully authorise or permit such default shall be liable to the like penalty ; and if any director, manager, or officer of such company, or any person on its behalf, uses or authorises the use of any seal purporting to be a seal of the company whereon its name is not so engraven as aforesaid, or issues or authorises the issue of any notice, advertisement, or other official publication of such company, or signs or authorises to be signed on behalf of such company any bill of exchange, promissory note, endorsement, cheque, order for money or goods, or issues or authorises to be issued any bill

of parcels, invoice, receipt, or letter of credit of the company, wherein its name is not mentioned in manner aforesaid, he shall be liable to a penalty of fifty pounds, and shall further be personally liable to the holder of any such bill of exchange, promissory note, cheque, or order for money or goods, for the amount thereof, unless the same is duly paid by the company (*a*).

47. A promissory note or bill of exchange shall be deemed to have been made, accepted, or indorsed on behalf of any company under this Act, if made, accepted, or indorsed in the name of the company by any person acting under the authority of the company, or if made, accepted, or indorsed by or on behalf of or on account of the company by any person acting under the authority of the company (*b*).

Right to Exclusive Use of Name.

The Companies Act, 1862, provides—

20. No company shall be registered under a name identical with that by which a subsisting company is already registered, or so nearly resembling the same as to be calculated to deceive, except in a case where such subsisting company is in the course of being dissolved and testifies its consent in such manner as the registrar requires; and if any company, through inadvertence or otherwise, is, without such consent as aforesaid, registered by a name identical with that by which a subsisting company is registered, or so nearly resembling the same as to be calculated to deceive, such first-mentioned company may, with the sanction of the registrar, change its name; and upon such change being made the registrar shall enter the new name on the register in the place of the former name, and shall issue a certificate of incorporation altered to meet the circumstances of the case; but no such alteration of name shall affect any rights or obligations of the company, or render defective any legal proceedings instituted or to be instituted by or against the company; and any legal proceedings may be continued or commenced against the company by its new name that might have been continued or commenced against the company by its former name (*c*).

(*a*) As to the consequences of omitting "Limited," see *Penrose v. Martyr* (1858), E. B. & E. 499; 28 L. J. Q. B. 28; *Atkins v. Wardle* (1889), 58 L. J. Q. B.

377. See also *Nassau Steam Press v. Tyler* (1894), 70 L. T. 376.

(*b*) See Part IV. Chap. 2.

(*c*) See *Reg. v. Registrar of Friendly*

Injunction.—Apart from the above section, any company, although not itself registered under the Act, can obtain an injunction restraining the registration of a projected new company which is intended to carry on a similar business and to bear a name so like that of the former as to be calculated to deceive the public, or, in the ordinary course of human affairs, to be confounded therewith (*d*).

There is, moreover, nothing in the Companies Act, 1862, to affect the right of a company registered under a particular name to an injunction restraining another company which, notwithstanding the prohibition of sect. 20 against identity of names, has been registered under an identical or a similar name, from carrying on its business under that name, if it is proved that that name is calculated to deceive; the principles applicable to individuals trading under identical or similar names applying equally to companies (*e*).

But if the plaintiffs, although they claim to have established a bank, have never carried on the business of banking, they will have no cause of action against another bank of the same or a similar name (*f*).

And where the short address "Street, London," had been used for many years in sending telegrams from abroad to Street & Co., of Cornhill, and a bank adopted by arrangement with the Post Office the phrase "Street, London," as a cypher address for telegrams from abroad to themselves, it was held that the Court

Societies (1872), L. R. 7 Q. B. 741; *Reg. v. Registrar of Joint Stock Companies* (1847), 10 Q. B. 839.

(*d*) *Hendriks v. Montagu* (1881), 17 Ch. D. 638. See also *Tussaud v. Tussaud* (1890), 44 Ch. D. 678; *Saunders v. Sun Life Assurance Co. of Canada*, [1894] 1 Ch. 537; *La Société Anonyme des Anciens Établissements Panhard et Levassor v. Panhard Levassor Motor Co., Limited*, [1901] 2 Ch. 513.

(*e*) *Merchant Banking Co. of London v. Merchants' Joint Stock Bank* (1878), 9

Ch. D. 560; *Capital and Counties Bank v. Capital and County Deposit Bank*, "Times" Newspaper, 12th February, 1884, p. 3. Cf. *London and County Banking Co. v. Hampshire and North Wilts Bank*, "Times" Newspaper, 8th June, 1878, p. 6.—As to an attempt by a bank to pass off its shares by an unauthorized use of the name of another bank, see *Lloyds Bank v. Royal British Bank* (1903), 19 T. L. R. 548, 604.

(*f*) *Lawson v. Bank of London* (1856), 18 C. B. 84.

had no jurisdiction to restrain the bank from using such cypher address (*g*).

Defamation.

A company can maintain an action in respect of a libel calculated to injure its reputation in the way of its business without proof of special damage (*h*).

“Statements may be made with regard to their mode of carrying on business, such as to lead people of ordinary sense to the opinion that they conduct their business badly and inefficiently. If so, the law will be the same in their case as in that of an individual, and the statement will be libellous. Then, if the case be one of libel—whether on a person, a firm, or a company—the law is that the damages are at large. It is not necessary to prove any particular damage; the jury may give such damages as they think fit, having regard to the conduct of the parties respectively, and all the circumstances of the case” (*i*).

“If, for example, an individual, a private partnership, or a corporation were carrying on a trading business, and some one wrote and published an untrue statement that they were insolvent, or any other statement which might destroy their credit or paralyze their business, it is obvious that such a statement, if untrue, would be a libel” (*j*).

Accordingly, to say of bankers that they have suspended payment is, of course, actionable (*k*).

But words used which have no libellous tendency do not become actionable merely because they are damaging.

In *Capital and Counties Bank v. Henty* (*l*) H. & Sons were in the habit of receiving, in payment from their customers, cheques

(*g*) *Street v. Union Bank of Spain and England* (1885), 30 Ch. D. 156.

(*h*) *South Hetton Coal Co. v. North Eastern News Association*, [1894] 1 Q. B. 133. See also *Mayor, &c. of Manchester v. Williams*, [1891] 1 Q. B. 94; *Yorkshire Provident Life Assurance Co. v. Gilbert and Rivington*, [1895] 2 Q. B. 148.

(*i*) Per Lord Esher, M. R., in *South*

Hetton Coal Co. v. North Eastern News Association, [1894] 1 Q. B. 133, at p. 139.

(*j*) Per Kay, L. J., in case cited in last note, at p. 145.

(*k*) *Forster v. Lawson* (1826), 3 Bing. 452. See also *Bromage v. Prosser* (1825), 4 B. & C. 247; (1824), 1 C. & P. 475.

(*l*) (1882), 7 A. C. 741.

on various branches of a bank, which the bank cashed for the convenience of H. & Sons at a particular branch. Having had a squabble with the manager of that branch, H. & Sons sent a printed circular to a large number of their customers (who knew nothing of the squabble)—“H. & Sons hereby give notice that they will not receive in payment cheques drawn on any of the branches of the” bank. The circular became known to other persons; there was a run on the bank and loss inflicted. The bank having brought an action against H. & Sons for libel, with an innuendo that the circular imputed insolvency, it was held, that in their natural meaning the words were not libellous; that the inference suggested by the innuendo was not the inference which reasonable persons would draw; that the onus lay on the bank to show that the circular had a libellous tendency; that the evidence, consisting of the circumstances attending the publication, failed to show it; that there was no case to go to the jury; and that the defendants were entitled to judgment.

Where words imputing insolvency in trade are spoken of one of the partners in a firm, such individual partner may maintain an action of slander and recover damages for the injury done to him; and it is not necessarily to be considered as an injury to the partnership, for which a joint action only can be maintained (*m*).

(*m*) *Harrison v. Bevington* (1838), 8 C. & P. 708.

CHAPTER VIII.

HOLIDAYS.

BANKS are not open for the transaction of business on Sunday, Christmas Day, Good Friday, Easter Monday, Whit Monday, the first Monday in August, the 26th of December, or, if the latter day falls on a Sunday, the 27th of December. Such days are called non-business days (*a*).

They remain closed in England and Ireland on Sunday, Christmas Day and Good Friday by virtue of ancient custom recognized by various statutes (*b*); and on Easter Monday, Whit Monday, the first Monday in August, and the 26th of December if a week-day, by virtue of the Bank Holidays Act, 1871 (*c*), and on the 27th of December when the 26th is a Sunday, by virtue of the Holidays Extension Act, 1875 (*d*). In Ireland they also remain closed on St. Patrick's Day (17th March) when a week-day, and when that day is a Sunday on the next day, by virtue of the Bank Holiday (Ireland) Act, 1903 (*e*).

Days on which banks are closed by virtue of the three last-mentioned statutes are called "bank holidays."

Moreover, the King may from time to time appoint by proclamation a special day to be observed as a bank holiday, either throughout the United Kingdom, or in any part of it, or in any county, city, borough, or district therein; and any day so appointed shall be observed accordingly, and, as regards bills of exchange and promissory notes payable in the locality mentioned, be deemed to be a bank holiday for all the purposes of the Bank Holidays Act (*f*).

(*a*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 92.

(*b*) See the section referred to in the last note.

(*c*) 34 Vict. c. 17.

(*d*) 38 Vict. c. 13, s. 3.

(*e*) 3 Edw. 7, c. 1.—In Scotland the bank holidays are New Year's Day,

Christmas Day—if either of the foregoing falls on a Sunday, the next day—Good Friday, the first Monday of May, and the first Monday of August: Bank Holidays Act, 1871, Schedule. See also 43 & 44 Vict. c. 17.

(*f*) Bank Holidays Act, 1871, s. 4. See as to Ireland 38 Vict. c. 13, s. 3.—

On the other hand, in any year, his Majesty, if it is made to appear to him in Council that it is inexpedient that a day appointed by the Acts to be a bank holiday should be so, may declare that it shall not in such year be a bank holiday and appoint another day instead, which shall in such year be substituted therefor (*g*).

In the case of a bill of exchange or promissory note, when the last day of grace falls on a Sunday, Christmas Day, Good Friday, or a day appointed by proclamation as a public fast or thanksgiving day, it is due and payable on the preceding business day, except that, when the last day is a bank holiday (in the sense above mentioned) or a Sunday, and the second day a bank holiday, it is due and payable on the succeeding business day (*h*).

A bill of exchange or promissory note purporting to be due and payable on a day which is a bank holiday, is payable, and in case of non-payment may be noted and protested, on the next following business day (*i*).

So when the day on which notice of dishonour should be given, or on which a bill or note should be presented or received for acceptance, or accepted or forwarded to any referee or referees, is a bank holiday, such notice shall be given and such bill or note shall be presented or forwarded on the day next following such bank holiday (*k*).

Any payment or act which a person would not be compellable to make or do on Christmas Day or Good Friday, he is not compellable to make or do on a bank holiday. The making or doing thereof on the following day will suffice (*l*).

Where, by the Bills of Exchange Act, the time limited for doing any act or thing is less than three days (*m*), in reckoning time non-business days are excluded (*n*).

Metropolitan police courts may be closed on such a day by order of the Secretary of State: Metropolitan Police Courts (Holidays) Act, 1897 (60 Vict. c. 14), s. 1.

(*g*) Bank Holidays Act, 1871, s. 5.
See as to Ireland 38 Vict. c. 13, s. 3.

(*h*) Bills of Exchange Act, 1882 (45

& 46 Vict. c. 61), ss. 14, 92; Bank Holidays Act, 1871, s. 1.

(*i*) Bank Holidays Act, 1871, s. 1.

(*k*) *Ibid.* s. 2.

(*l*) *Ibid.* s. 3.

(*m*) See Bills of Exchange Act, ss. 42, 49 (12), 67 (2).

(*n*) *Ibid.* s. 92.

CHAPTER IX.

CRIMES RELATING TO BANKING.

Misappropriation.

THE Larceny Act, 1901 (1 Edw. 7, c. 10), provides as follows:—

1.—(1.) Whosoever—

- (a) being entrusted, either solely or jointly with any other person, with any property, in order that he may retain in safe custody or apply, pay or deliver, for any purpose or to any person, the property or any part thereof or any proceeds thereof; or
- (b) having, either solely or jointly with any other person, received any property for or on account of any other person, fraudulently converts to his own use or benefit, or the use or benefit of any other person, the property or any part thereof or any proceeds thereof, shall be guilty of a misdemeanour, and be liable on conviction to penal servitude for a term not exceeding seven years, or to imprisonment, with or without hard labour, for a term not exceeding two years.

(2.) Nothing in this section shall apply to or affect any trustee on any express trust created by a deed or will, or any mortgagee of any property, real or personal, in respect of any act done by the trustee or mortgagee in relation to the property comprised in or affected by any such trust or mortgage (a).

2.—(1.) Sections seventy-five and seventy-six of the Larceny Act, 1861, are hereby repealed.

(2.) This Act shall have effect as part of the Larceny Act, 1861, and section one of this Act shall be deemed to be substituted

(a) Cf. *Thompson v. Giles* (1824), 2 B. Bengal (1836), 1 Deac. 622, at p. 681; & C. 422, at p. 434; *Young v. Bank of* 1 Moo. P. C. 150.

for sections seventy-five and seventy-six of that Act, and references in any enactment to those sections shall be construed as references to section one of this Act (b).

The Larceny Act, 1861 (24 & 25 Vict. c. 96), provides—

81. Whosoever, being a director, member, or public officer of any body corporate or public company, shall fraudulently take or apply for his own use or benefit, or for any use or purposes other than the use or purposes of such body corporate or public company, any of the property of such body corporate or public company, shall be guilty of a misdemeanour, and being convicted thereof shall be liable, at the discretion of the Court, to any of the punishments which the Court may award as hereinbefore last mentioned.

82. Whosoever, being a director, public officer, or manager of any body corporate or public company, shall as such receive or possess himself of any of the property of such body corporate or public company otherwise than in payment of a just debt or demand, and shall, with intent to defraud, omit to make or to cause or direct to be made a full and true entry thereof in the books and accounts of such body corporate or public company, shall be guilty of a misdemeanour, and being convicted thereof shall be liable, at the discretion of the Court, to any of the punishments which the Court may award as hereinbefore last mentioned.

Where a director had been convicted of fraudulently appropriating the moneys of a bank by overdrawing on a so-called trust account irregularly opened in his name, but it appeared that there was no evidence that he had misappropriated any one draft to his own use in fraud of the bank, the conviction was set aside by the Judicial Committee (c).

Destruction and Falsification of Books.

83. Whosoever, being a director, manager, public officer, or member of any body corporate, or public company, shall, with intent to defraud, destroy, alter, mutilate, or falsify any book,

(b) It is accordingly unnecessary to consider such cases as *Reg. v. Newman* (1881), 8 Q. B. D. 706; *Reg. v. Portugal* (1885), 16 Q. B. D. 487; *Reg. v. Bowerman*, [1891] 1 Q. B. 112; *In re Bellen-*

contre, [1891] 2 Q. B. 122, 138; 60 L. J. M. C. 83; *Reg. v. Kane*, [1901] 1 Q. B. 472.

(c) *Nelson v. Rex*, [1932] A. C. 250.

paper, writing, or valuable security belonging to the body corporate or public company, or make or concur in the making of any false entry, or omit or concur in omitting any material particular, in any book of account or other document, shall be guilty of a misdemeanour, and being convicted thereof shall be liable, at the discretion of the Court, to any of the punishments which the Court may award as hereinbefore last mentioned.

Publication of False Accounts.

84. Whosoever, being a director, manager, or public officer of any body corporate or public company, shall make, circulate or publish, or concur in making, circulating or publishing, any written statement or account which he shall know to be false in any material particular, with intent to deceive or defraud any member, shareholder, or creditor of such body corporate or public company, or with intent to induce any person to become a shareholder or partner therein, or to intrust or advance any property to such body corporate or public company, or to enter into any security for the benefit thereof, shall be guilty of a misdemeanour, and being convicted thereof shall be liable, at the discretion of the Court, to any of the punishments which the Court may award as hereinbefore last mentioned (*d*).

Apart from the foregoing statutory provisions, directors of a bank who, knowing it to be in a state of insolvency, issue a balance-sheet showing a profit, and thereupon declare a dividend, and who issue advertisements inviting the public to take shares upon the faith of their representations that the bank is in a flourishing condition, may be convicted of a conspiracy to defraud (*e*).

Receiving Deposit for Illegal Purpose.

If a banker permits a sum of money to be lodged with him, which is, to his knowledge, intended to be paid over for an illegal purpose, for example, to corruptly procure an appointment under

(*d*) See also the Companies Act, 1900, s. 28.

(*e*) *Reg. v. Brown and others* (1858), 7 Cox, C. C. 442. See also *Reg. v. Burch and another* (1865), 4 F. & F. 407.

Government, he may be convicted of illegally conspiring with those whose schemes he is thus furthering (*f*).

Other Offences.

Crimes, other than the foregoing, in reference to banking documents and other matters connected with banking business, are dealt with in various parts of this treatise in connection with the matters to which they specially relate.

Incriminating Admissions.

A banker cannot be convicted under either of the sections of the Larceny Act which are cited in this chapter upon any evidence in respect of any act done by him, if, at any time previously to his being charged with the offence, he has first disclosed such act on oath, in consequence of any compulsory process of any Court, in any proceeding which has been *bonâ fide* instituted by any party aggrieved (*g*). And a statement or admission made by any person in any compulsory examination or deposition before any Court on the hearing of any matter in bankruptcy is not admissible as evidence against that person in any proceeding in respect of any of the misdemeanours referred to in the above sections (*h*).

COMPOSITION FOR CRIME.

A contract to stifle or withdraw from a prosecution, whether for felony or misdemeanour, is illegal and unenforceable. It is usually referred to as compounding the crime.

If a person who has lost money or other property through a crime recovers it, or obtains compensation by agreeing not to prosecute the criminal, this offence is committed. If the compensation takes the form of an executory agreement, it is unenforceable.

It is not necessary that the criminal should be a party to the

(*f*) *Rex v. Pollman* (1809), 2 Camp. 229, 233.

(*g*) Larceny Act, 1861, s. 85. See *Reg. v. Strahan* (1855), 7 Cox, C. C. 85.

(*h*) 53 & 54 Vict. c. 71, s. 27 (2).

agreement. A transfer of property to satisfy the deficiency caused by his crime made by another as the inducement to the defrauded party to abstain from prosecuting will render the bargain illegal (i).

In *Ex parte Wolverhampton Banking Co., In re Campbell* (k), a banking company commenced a prosecution against a customer for having obtained credit from them under false pretences, which is, by sect. 13 of the Debtors Act, 1869, made a misdemeanour. At this time the bank had notice of an act of bankruptcy committed by the customer. On the day on which the summons was to be heard by the magistrate, H. (whose wife was an aunt of the customer's wife) signed an undertaking that, if the magistrate would allow the summons to be withdrawn, he would pay the bank the sum which the customer had obtained from them by the false pretences. An application was made to the magistrate by the customer's solicitor to allow the summons to be withdrawn. The application was assented to by the bank's solicitor and was granted by the magistrate. H. then paid the money to the bank. The bank manager believed that H. was paying the money out of his own pocket. The customer was soon afterwards adjudicated a bankrupt, upon the act of bankruptcy of which the bank had notice. The trustee in the bankruptcy discovered that the money which H. had paid to the bank had been previously handed to him by the bankrupt's wife, she having, with the bankrupt's knowledge, taken it for the purpose of paying the bank out of a bag of money belonging to the bankrupt. It was held that the consideration for the payment to the bank being the stifling of a prosecution, there was no legal consideration, and that, though H., being *in pari delicto*, could not have recovered the money from the bank, the trustee, to whom by virtue of the relation back of his title to the act of bankruptcy the money really belonged, could recover it (l).

In *Williams v. Bayley* (m) a son carried to bankers, of whom he, as well as his father, was a customer, certain promissory notes with

(i) *Claridge v. Hoare* (1807), 14 Ves. 59.

(k) (1884), 14 Q. B. D. 32.

(l) See also *Windhill Local Board v. Vint* (1890), 45 Ch. D. 351; *Fivaz v.*

Nicholls (1846), 2 C. B. 501; *Wallace v. Hardacre* (1807), 1 Camp. 45; *In re Mapleback, Ex parte Caldecott* (1876), 4 Ch. D. 150.

(m) (1866), 1 E. & I. A. 200.

his father's name upon them as indorser. These indorsements were forgeries. On one occasion the father's attention was called to the fact that a promissory note of his son with his (the father's) name on it, was lying at the bankers' dishonoured. He seemed to have communicated the fact to his son, who immediately redeemed it; but there was no direct evidence to show whether the father did or did not really understand the nature of the transaction. The fact of the forgery was afterwards discovered; the son did not deny it; the bankers insisted (though without any direct threat of a prosecution) on a settlement, to which the father was to be a party; he consented, and executed an agreement to make an equitable mortgage of his property. The notes, with the forged indorsements, were then delivered up to him. It was held that the agreement was invalid, on the ground that a father appealed to, under such circumstances, to take upon himself a civil liability, with the knowledge that, unless he does so, his son will be exposed to a criminal prosecution, with a moral certainty of a conviction, even though that is not put forward by any party as the motive for the agreement, is not a free and voluntary agent, and the agreement he makes under such circumstances is not enforceable in equity (*n*).

Lord Chancellor Cranworth and Lord Westbury further held that the agreement was bad as being one the object of which was to stifle a prosecution. As to this the latter said: "I apprehend the law to be this, and unquestionably it is a law dictated by the soundest considerations of policy and morality, that you shall not make a trade of a felony. If you are aware that a crime has been committed, you shall not convert that crime into a source of profit or benefit to yourself. But that is the position in which these bankers stood. . . . I asked, in the first place, were you not well aware that these bills were forgeries? That is perfectly true. Did you not obtain an additional advantage and benefit; in fact, the payment of your debt, by trading with these bills? That is undoubtedly true. Were you not very well aware that when you so traded with these bills you would either prevent the possibility of a prosecution, or render the possibility of a prosecution so remote, that it could

(*n*) See also *Brook v. Hook* (1871), L. R. 6 Ex. 89.

hardly be expected to succeed? That was the inevitable consequence. But if a man does an act which is attended necessarily with an inevitable consequence, he must be taken in law to have foreseen that consequence, and, in point of fact, to have deliberately intended that it should be the result of his action. Here you have these bankers violating that rule of policy, and that rule of justice and morality, by using these forged bills to extort from the father a security which he was not liable for, they giving up the bills, and thereby violating their duty, and placing the parties in a situation in which the demands of public justice could not by any possibility be complied with. My Lords, I regard this as a transaction which must necessarily, for purposes of public utility, be stamped with invalidity, because it is one which undoubtedly, in the first place, is a departure from what ought to be the principles of fair dealing between man and man, and it is also one which, if such transactions existed to any considerable extent, would be found productive of great injury and mischief to the community. I think, therefore, that the decree which has been made in this case is a perfectly correct decree. I do not mean for one single moment, by anything I have said, to cast any imputation on the character of these gentlemen. I am only dealing with abstract principles of law" (o).

Legitimate Restitution.

There is, however, a debt due from the criminal to the person whose money he has feloniously taken.

In *Chowne v. Baylis* (p) a clerk in a banking company had robbed his employers of a large sum of money, and before conviction he deposited the deeds of some real estates with the company, and directed a transfer of certain policies of assurance on his life to be made to them as a security, so far as they would extend, for the money taken. The company afterwards prosecuted him for

(o) Cf. *Jones v. Merionethshire Permanent Benefit Building Society*, [1892] 1 Ch. 173; 61 L. J. Ch. 138; *Flower v. Sadler* (1882), 10 Q. B. D. 572.

(p) (1862), 31 L. J. Ch. 757.

the felony to conviction, and, upon a suit to realise the securities, it was held that the money taken was a debt due from the felon to the company, and a good consideration for the securities given by the felon to the company.

The debt which arises out of the crime is, indeed, enforceable by civil action after the satisfaction of public justice (*q*).

Moreover, in order to render illegal the receipt of securities from the debtor, it is not enough that the creditor was thereby induced to abstain from prosecuting (*r*). Even a threat of prosecution will not apparently vitiate a subsequent agreement by the debtor to give security for the debt which he owes (*s*).

A fortiori a debt arising on an independent contract antecedent to the corrupt bargain is enforceable.

In *Ex parte Leslie, In re Guerrier* (*t*), bankers had allowed a customer to overdraw his current account on his depositing with them as security for the overdraft some bills of exchange drawn by him upon, and purporting to be accepted by, a third person. After the customer had overdrawn his account the bankers discovered that the acceptances were forgeries. They then communicated with the customer, and ultimately gave up the forged acceptances to him, receiving from him in exchange joint and several promissory notes of himself and his father. The customer was afterwards adjudicated a bankrupt. The notes were not paid at maturity. It was held that, though the bankers had not prosecuted the bankrupt for the felony, and whether they had or had not agreed not to prosecute him, they were entitled to prove in the bankruptcy for the balance due to them upon the bankrupt's current account.

"One of the inducements to the bankers to allow the overdraft was," said Sir George Jessel, M. R., "the deposit of the forged bills; but the loan was an ordinary loan, and the contract for the

(*q*) *Ex parte Ball, In re Shepherd* (1879), 10 Ch. D. 667. See also *Dudley, &c. Banking Co. v. Spittle* (1860), 1 J. & H. 14; 2 L. T. 47; 8 W. R. 351; *Ex parte Leslie, In re Guerrier*, see note (*t*), *infra*; *Hargreave v. Spink*, [1892] 1 Q. B. 25.

(*r*) *Flower v. Sadler* (1882), 10 Q. B.

D. 572, where the Court distinguished and explained *Williams v. Bayley*, cited on p. 107, *supra*.

(*s*) *Ibid.*

(*t*) (1882), 20 Ch. D. 131; 51 L. J. Ch. 689.

loan was not destroyed or affected by anything which subsequently occurred. We have been referred to a line of authorities which seem to show that when a claim arises out of a felony, you cannot sue for it until you have prosecuted the felon, or some one else has prosecuted him, or a prosecution has become impossible. That may or not be so ; I do not wish to discuss that question on the present occasion. But, assuming that it is so, the rule has no application to the present case, in which the claim is founded on an independent contract antecedent to the corrupt bargain."

CHAPTER X.

THE BANK OF ENGLAND.

Constitution.

THE Governor and Company of the Bank of England were first incorporated by Royal Charter under the provisions of 5 & 6 Will. & Mary, c. 20, s. 20. The privileges, duties and constitution of the Bank have been modified from time to time by various statutes, of which the following are the most important:—8 & 9 Will. 3, c. 20; 39 & 40 Geo. 3, c. 28; 3 & 4 Will. 4, c. 98; Bank Charter Act (7 & 8 Vict. c. 32); 19 & 20 Vict. c. 20; 35 & 36 Vict. c. 34; Bank Act, 1892 (55 & 56 Vict. c. 48) (*a*).

Ordinary Banking Business.

The Bank may deal in bills of exchange, or in buying and selling bullion, gold and silver, and may sell any goods, wares or merchandise *bonâ fide* left or deposited with it for money lent and advanced thereon, and not redeemed at the time agreed on or within three months after. It may also sell goods which are the produce of lands purchased by it (*b*).

But it may not deal or trade with any of its stock-moneys or effects in the buying or selling of goods, wares or merchandise (*c*).

(*a*) The history of the Bank of England is detailed in *Bank of England v. Anderson* (1837), 3 Bing. N. C. 589.—Nothing contained in the Bills of Exchange Act affects the provisions of any

Act relating to or confirming the privileges of the Bank of England or the Bank of Ireland: sect. 97 (3).

(*b*) 5 & 6 Will. & Mary, c. 20, s. 28.

(*c*) *Ibid.* s. 27.

In so far as the Bank of England acts in the same capacity as other companies carrying on the business of banking, it enjoys the same rights and is subject to the same obligations and liabilities. This proposition is illustrated by many cases cited in this treatise in which the Bank has appeared as a litigant, and in which questions of ordinary banking law have been involved.

In this connection its exceptional character arises from the fact that it not only acts as the bank of individuals, but is also pre-eminently the banker's bank.

Issue of Notes.

The Bank can issue notes payable on demand throughout England and Wales, and it has a monopoly of issuing such notes in London and within three miles thereof.

The subject of bank notes is dealt with at pages 500—533.

State Business.

As the Bank of the State, having the duty of keeping the accounts of the great departments of the public service, its position is unique.

Owing, however, to the exclusion of any form of *droit administratif* from English jurisprudence, even in its capacity of the Bank of the State, its duties and liabilities are no less well pronounced than its rights, and are defined according to the ordinary principles of the common law. Accordingly, for the most part, they do not call for any special or separate treatment in this work.

Management of National Debt.

The Bank manages the business connected with the National Debt, the stock of which is transferable in its books (or those of the Bank of Ireland) by the several stockholders for the time being and their representatives.

Payment of Dividends.

The following provisions are contained in the National Debt Act, 1870 (*d*):—

13. Until all stock is redeemed, the Banks of England and Ireland shall each continue to employ within their office a fit person as their chief cashier, and another fit person as their accountant-general.

14. The money from time to time and at any time issuable out of the consolidated fund, and by this Act made applicable to the payment of the dividends on stock, shall, by order of the Treasury, without other warrant, from time to time be issued and paid to the respective chief cashiers of the Banks of England and Ireland by way of imprest and on account for the payment of those dividends.

15. The chief cashier to whom money is from time to time so issued shall from time to time without delay apply the same in payment of the dividends on stock.

17. The Bank of England or of Ireland shall not be required to allow any executors or administrators to receive any dividend on stock held by their testator or intestate until the probate of the will or the letters of administration has or have been left with the Bank for registration.

18. The Banks of England and Ireland respectively, before allowing the receipt of any dividend on any stock, may, if the circumstances of the case appear to them to make it expedient, require evidence of the title of any person claiming a right to receive the dividend.

That evidence shall be the declaration of competent persons under the Statutory Declarations Act, 1835, or of such other nature as the Banks respectively require.

19. Where stock is standing in the name of an infant or person of unsound mind, jointly with any person not under legal disability, a letter of attorney for the receipt of the dividends on the stock shall be sufficient authority in that behalf, if given under the hand and seal of the person not under disability, attested by two or more credible witnesses.

The Bank of England or of Ireland, before acting on the letter of attorney, may require proof to their satisfaction of the

alleged infancy or unsoundness of mind, by the declaration of competent persons under the Statutory Declarations Act, 1835.

The National Debt Act, 1889 (*e*), provides—

4.—(1.) The Banks of England and Ireland respectively may from time to time, with the concurrence of the Treasury, make regulations for the payment of dividends on stock either by sending warrants through the post, or by payment through a banker, or by payment at a country branch.

(2.) Where a dividend warrant is sent by post in accordance with any such regulations, the posting of the letter containing the warrant, addressed in the manner prescribed by the regulations, shall, as respects the liability of the Bank, be equivalent to the delivery of the warrant to the stockholder.

(3.) Any arrangements made before the passing of this Act for the payment of dividends by warrants sent through the post shall continue, unless and until altered by regulations made after the passing of this Act in pursuance of this section.

(4.) Where two or more persons are registered as joint holders of stock, any one of those persons may give an effectual receipt for any dividend on the stock unless notice to the contrary has been given to the Bank by any other of the holders.

(5.) Where two or more persons have given a letter or power of attorney for the receipt of dividends on stock, and one of them becomes of unsound mind, the letter or power shall not thereby be made void.

(6.) This section shall apply to all stock of any company or corporation, funds or annuities, transferable in the books of the Bank of England or of Ireland.

(7.) This section shall be construed and have effect as part of the National Debt Act, 1870.

The National Debt (Stockholders' Relief) Act, 1892 (*f*), provides—

2. The Bank may strike the balance for a dividend on stock on any day not being more than thirty-seven days before the day on which the dividend is payable, and any person who is on the day of the balance being struck inscribed as a stockholder shall, as between himself and any transferee of the stock, be

(*e*) 52 Vict. c. 6.

(*f*) 55 & 56 Vict. c. 39.

entitled to the then current half-year's or quarter's dividend thereon.

3. In the following cases, namely—

- (a) Where an infant is the sole survivor in an account; and
- (b) Where an infant holds stock jointly with a person under legal disability; and
- (c) Where stock has by mistake been brought in or transferred into the sole name of an infant,

the Bank may, at the request in writing of the parent, guardian, or next friend of the infant, receive the dividends and apply them to the purchase of like stock, and the stock so purchased shall be added to the original investment.

4.—(1.) Where, by virtue of any provision in an Act of Parliament, the right to stock is vested in any person, he shall by virtue of the same provision be deemed to be entitled to make a valid transfer of the stock, and to receive and give a valid receipt for any accrued or accruing dividends on the stock.

(2.) Where by virtue of any such provision the right to transfer stock is vested in any person, he shall by virtue of the same provision be deemed to be entitled to receive, and give a valid receipt for, any accrued or accruing dividends on the stock.

Bill drawn on Bank.—It is hardly necessary to say that the Bank of England is under no obligation to accept a bill drawn upon it by a person who owns Government securities on which large dividends are due and in the hands of the Bank (*g*).

Stock in Name of Person Non Compos Mentis.—Under sect. 116 of the Lunacy Act, 1890 (*h*), the judge or master in lunacy has jurisdiction to make an order (which should not be intituled “In Lunacy”) appointing a receiver of dividends on stock standing in the Bank of England in the name of a person who is, “through mental infirmity arising from disease or age, incapable of managing his affairs.” Under sects. 133 and 146 the Bank may safely act on such order. It is, however, unusual to appoint a receiver of dividends on Bank of England stock standing in the name of another person; and the better course in such cases, in the absence

(*g*) *In re Boyse, Crofton v. Crofton* (1886), 33 Ch. D. 612.

(*h*) 53 & 54 Vict. c. 5.

of any special reason to the contrary, is to bring the stock into Court, and then to let the receiver obtain the dividends from the Paymaster-General. But if, for any special reason, an order appointing a receiver of dividends without ordering the stock to be transferred into Court should be made, the Bank ought to act upon it and pay the dividends to the receiver, treating him as an agent duly appointed to receive dividends only (i).

Transfer of Stock.

The National Debt Act, 1870, provides—

22. In the offices of the respective accountants-general of the Banks of England and Ireland books shall continue to be kept wherein all transfers of stock shall be entered.

Every such entry shall be conceived in proper words for the purpose of transfer, and shall be signed by the party making the transfer, or, if he is absent, by his attorney thereunto lawfully authorized by writing under his hand and seal, attested by two or more credible witnesses.

The person to whom a transfer is so made may, if he thinks fit, underwrite his acceptance thereof.

Except as otherwise provided by Act of Parliament, no other mode of transferring stock shall be good in law.

23. The interest of a stockholder dying (before or after the passing of this Act) in stock shall be transferable by his executors or administrators, notwithstanding any specific bequest thereof.

The Bank of England or of Ireland shall not be required to allow any executors or administrators to transfer any stock until the probate of the will of or the letters of administration to the deceased has or have been left with the Bank for registration, and may require all the executors who have proved the will to join in the transfer.

24. The Banks of England and Ireland respectively before allowing any transfer of stock may, if the circumstances of the case appear to them to make it expedient, require evidence of the title of any person claiming a right to make the transfer.

That evidence shall be the declaration of competent persons under the Statutory Declarations Act, 1835, or of such other nature as the Banks respectively require.

(i) *In re Broune*, [1894] 3 Ch. 412. See also *In re Purvis*, [1904] 1 Ch. 373.

25. The Banks of England and Ireland respectively may close their books for the transfer of stock on any day in the month next preceding that in which the dividends on that stock are payable, but so that the books be not at any time so closed for more than fifteen days.

The persons who on the day of such closing are inscribed as stockholders shall, as between them and their transferees of stock, be entitled to the then current half-year's dividend thereon.

The National Debt Act, 1888 (*k*), provides—

18. In the registers of new stock, the Bank shall allow any holder or joint holders to have more than one account, provided that each account is distinguished either by a number or by such other designation as may be directed by the Bank, and that the Bank shall not be required to permit more than four accounts to be opened in the same name or names.

The National Debt (Stockholders' Relief) Act, 1892 (*l*), provides—

5. The Bank may in any register of stock allow any holder or joint holders to have more than one account. Provided as follows:—

- (1.) Each account must be distinguished by a number or by such other designation as may be directed by the Bank ;
- (2.) The Bank shall not be required to permit more than four accounts to be opened in the same name or names ; and
- (3.) Nothing in this section shall affect the Bank with notice of any trust.

6. Stock may be transferred to and held in the names of an individual and a body corporate, or of two or more bodies corporate, and any such holding shall in its relation to the Bank be deemed a joint tenancy.

The instructions printed on the form of request issued by the Bank state: "There is nothing to be gained by varying the order of the names in joint accounts (*m*). Four accounts, and four accounts only, will be permitted" (*n*).

Transfer upon Lunacy.—When a lunatic is donee of a power of appointing new trustees of a settlement, the judge has jurisdiction under sects. 128 and 129 of the Lunacy Act, 1890, to authorize

(*k*) 51 Vict. c. 2.

(1887) 47.

(*l*) 55 & 56 Vict. c. 39. See also 51 Vict. c. 2.

(*n*) It is stated in Lewin on Trusts, 10th ed., at p. 43, that more than four accounts have been allowed in special cases.

(*m*) See *In re Newman's Trusts*, W. N.

the committee of the lunatic to exercise the power on his behalf by appointing persons named in the order to be new trustees of the settlement. When the settlement comprises bank annuities, the order of the judge may properly go on to authorize the persons so named, upon their appointment as trustees, to call for a transfer of the bank annuities into their own names, to receive the dividends until transfer, and to hold the stock when transferred upon the trusts of the settlement. For the guidance of the Bank there should be something in the nature of a certificate by the master to show that the deed executed is the deed on which the Bank have to act (*o*).

Where a person of unsound mind, not so found by inquisition, was sole trustee of a sum of Consols, it was held that the Bank of England must act upon an order made by the judge in lunacy under the Acts of 1890 and 1891, that the right to call for a transfer of, and to transfer into his own name, the Consols standing in the name of the lunatic, and to receive the dividends thereon should vest in a certain person, and that he should transfer the Consols into his own name to be held by him upon the trusts applicable thereto, although no officer of the Bank had been appointed to make the transfer (*p*).

Trusts not recognised by Bank.—The Bank refuses and cannot be compelled to notice any rights but those of the legal proprietors in whose names stock is standing, or to recognise a tenancy in common, as distinguished from a joint tenancy of stock.

“The company will not enter notice of instruments *inter vivos* upon their books, and though they were formerly obliged by certain Acts of Parliament to enter the wills, or at least extracts from the wills, of deceased proprietors of stock, the object of the legislature, as the Court determined, was not to make the company responsible for the due administration of the fund according to the equitable right, but to enable them to ascertain who, under the will, were the persons legally entitled. Had the construction been otherwise, the Bank of England would

(*o*) *In re Shortridge*, [1895] 1 Ch. 278.

(*p*) *In re C. M. G., spinster*, [1898] 2 Ch. 324.

have been trustee for half the families in the kingdom. By 8 & 9 Vict. c. 97, repealed by 33 & 34 Vict. c. 69, but substantially re-enacted by the National Debt Act, 1870 (*q*), executors and administrators of a deceased holder of stock are enabled to transfer on producing probate or letters of administration, and the Acts requiring an entry or registration by the Bank of any will or codicil are repealed" (*r*).

Accordingly, as the Bank was not bound, even before the Act of 1870, to look beyond the legal estate to any trusts, it could not prevent an executor from selling out or transferring stock into his own name (*s*).

So, even, where the proprietor of stock in the public funds made a specific bequest of it, the Bank of England was nevertheless obliged to allow the executor to make a transfer of it, unless it could be shown that he had assented to the legacy (*t*).

It has been said that the Bank stands in relation to stock like a depositary of goods in relation to the goods, and can only be made responsible for a transfer of stock after distinct notice given to it of an existing claim upon the stock (*u*).

In *Lady Mayo's Case* (*x*) a transfer of moneys in the Bank in the name of a *feme covert* had been made by the husband. It was suspected that she held these moneys by virtue of a trust to her own separate use, and a memorandum was made by the Bank, on transferring the stock, of a defect of title suspected. It was held that to make a memorandum on a transfer of stock, signifying a flaw suspected in the title, was not permissible; and that no secret trust, as against the party who had the open legal title, would affect the Bank. Lord Mansfield added: "I won't say a word against the holder of the stock having his action against the Bank for disparaging his title."

(*q*) 33 & 34 Vict. c. 71, s. 23: see p. 117, *supra*.

(*r*) Lewin on Trusts, 10th ed., pp. 31, 32. See National Debt Act, 1870, s. 30; Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 7 (2).

(*s*) *Bank of England v. Parsons* (1800),

5 Ves. 665. Cf. *Hartga v. Bank of England* (1796), 3 Ves. 55.

(*t*) *Franklin v. Bank of England* (1829), 9 B. & C. 156. Cf. *Humberstone v. Chase* (1836), 2 Y. & C. Ex. 209.

(*u*) *Humberstone v. Chase*, see last note.

(*x*) (1772), Lofft, 65.

Tenancy in Common.—The Court will not compel the Bank to register a transfer in such a way as would oblige them to recognise a tenancy in common between owners of stock, as distinguished from a joint tenancy (*y*).

But stock may now be transferred to and held in the names of an individual and a body corporate, or of two or more bodies corporate, and any such holding shall, in its relation to the Bank, be deemed a joint tenancy (*z*).

Requirements as to Evidence.—The Bank of England is not bound to accept as sufficient evidence of the death of a stockholder on a joint account in its books, such proof as would satisfy the Court of Chancery.

In *Prosser v. Bank of England* (*a*) one C. P. had died in 1871. At her death a sum of Consols was standing in her and the plaintiff's names jointly. The burial of C. P. was entered in the proper parish register. An extract from the entry, together with a statutory declaration of the identity of C. P., was forwarded by the plaintiff to the Bank in order that they might affix to her name in their books the usual memorandum of death. The Bank declined, on the ground that "the declaration did not aver that the extract had been compared with the original register for the parish where C. P. was buried." A motion for an injunction to restrain the Bank from continuing the name of C. P. in their books without that memorandum was refused.

Liability of Bank for Delay.—In *Sutton v. Bank of England* (*b*) the plaintiff sued to recover the amount of a loss sustained by him in consequence of unreasonable delay in the passing of a power of attorney for the transfer of stock at the Bank.

Lord Chief Justice Abbott, in charging the jury, said: "The question is, whether there was an unreasonable delay in permitting

(*y*) *Law Guarantee and Trust Society v. Bank of England* (1890), 24 Q. B. D. 406. See also *Rex v. Bank of England* (1780), 2 Doug. 524.

(*z*) National Debt (Stockholders' Relief) Act, 1892 (55 & 56 Vict. c. 39),

s. 6; Bodies Corporate (Joint Tenancy) Act, 1899 (62 & 63 Vict. c. 20), s. 1.

(*a*) (1872), 13 Eq. 611; 41 L. J. Ch. 327; 26 L. T. 60; 20 W. R. 362.

(*b*) (1824), 1 C. & P. 193.

M'Dougall, the attorney named in the power, to transfer the stock. As regards this question, the Bank of England, notwithstanding their high character, stand in no other situation than that of a private banker. If they suffer a transfer to take place under an invalid power, they must answer to the individual; therefore they should have proper time allowed them to ascertain its authenticity. The question is not so much whether, when a reasonable doubt arises, which cannot be cleared up in town, the Bank should be allowed to write into the country; but the question upon this evidence is, whether there was reasonable ground of doubt, and, if so, did they take reasonable means to have that doubt cleared up? M'Dougall, it seems, went to Dawes, who is the chief accountant. Dawes refused to acquaint him with the difficulty. M'Dougall remonstrated, as was natural for a person so circumstanced; but Dawes still refused to tell him the nature of the objection. Now the question is, was it a fit and reasonable thing to withhold from M'Dougall this information, at a time when the difficulty might have been cleared up; and in deciding this, it will be proper to consider who M'Dougall is, for it is a very different thing whether you are treating with a stranger or a person in a known character. It appears that he is an attorney of forty years' standing; that he had acted under a former power, and was well known to the Bank solicitor. It is also a singular circumstance that one of the witnesses to the power in question was also a witness to a former power, and therefore they had the opportunity of making a double comparison of signatures. If there was either no ground of doubt, or if there was, and the Bank did not take reasonable methods of getting it cleared up, the verdict should be for the plaintiff. And then will come the question as to the quantum of loss. It appears that M'Dougall told Dawes that he was obliged to go into Norfolk, and that he did go, and did not return in time to receive the broker's note, which was written on the 25th. The Bank say the power was passed on the 24th. The broker says he inquired every day, and was not informed of it till the 25th. Now it is likely he inquired about half-an-hour before the passing, and the Bank might have sent their porter to call out his name in the Rotunda,

or they might have written to M^rDougall, with whose residence they were acquainted, but they did not do either." His Lordship then left the question to the jury, who returned a verdict for the plaintiff for 239*l.* 10*s.* 6*d.* damages.

Liability for Unauthorized Transfer.—If stock is transferred by the Bank in reliance upon a forgery, the amount must be replaced by the Bank.

In *Sloman v. Bank of England* (c) one of two trustees of a sum of stock had sold it out under a power of attorney to which he had forged the signature of his co-trustee, and some time afterwards absconded. It was held that the Bank was compellable to re-invest the stock in the name of the other trustee.

Moreover, in *Davis v. Bank of England* (d), it was held that a person might recover from the Bank of England the dividends arising on his stock in the funds, though at the time the dividends were payable he knew the stock had some months previously been placed, under a forged power of attorney, to the name of another person, and nevertheless omitted to inform the Bank of the circumstance, and did not demand payment of the dividends till after the escape of the offender; though it would be otherwise if the Bank had paid the dividends to persons to whom they could have refused to pay them had they been informed of the forgeries within a reasonable time after the stockholder had learned of them.

In the course of his judgment in this case, Lord Chief Justice Best said: "This case was put to us in argument. A., knowing that B. had forged A.'s name to a draft on his banker, sees B. come out of the banker's shop with the money obtained by the forgery, and neither arrests B. nor gives any information to the banker. Could A. recover this money again from the banker? A jury in such a case must find that A. was privy to the forgery at the time it was committed, and would, I think, infer that A. assented to it, and such finding would prevent his recovering in an action against the banker. But in the present case the jury have expressly negatived all knowledge on the part of the plaintiff until

(c) (1845), 14 Sim. 475.

(d) (1824), 5 B. & C. 185; 2 Bing. 393.

three months after the forgeries. They have also negatived assent, saying they have no evidence of assent except the concealment of what came to the plaintiff's knowledge five months after the forgeries, from which they have not inferred assent, nor can we" (e).

But a party who has executed a transfer of stock in the prescribed form cannot, in an action against the Bank, dispute the title of the transferee on the ground that he has not subscribed an acceptance of the transfer as directed by statute (f).

Charging Orders.—As to Charging Orders, Distringas, and Stop Orders, reference should be made to the Rules of the Supreme Court, Order XLVI.

In *In re Blaksley's Trusts* (g) a notice having been served on the Bank of England under rules 4 and 7 of Order XLVI., to prevent the transfer of stock or the payment of dividends thereon without notice to the persons serving the notice, the Bank gave notice to them that an application had been made to the Bank to allow the transfer of the stock and to pay the dividends thereon, and that they should comply with the application unless an order of the Court should be served on them within eight days. A motion was then made *ex parte* for an order to restrain the Bank from permitting the transfer or paying the dividends. It was held that the proper course was to grant an interim injunction over the next regular motion day, and that notice of the order must be served on the legal owners of the stock.

It may be mentioned here that stock forming part of the National Debt is not liable to foreign attachment by the custom of London or otherwise (h).

(e) In this case it was held "in error" that the declaration was bad, as it did not allege that the dividends had ever been issued by Government to the Bank, and as, until they were issued, it was not the duty of the Bank to pay them, under 11 Geo. 4 & 1 Will. 4, c. 13, s. 3, which provided that the sums for pay-

ment of the dividends should be issued and paid out of the Consolidated Fund. See sects. 14 and 15 of the National Debt Act, 1870, at p. 114, *supra*.

(f) *Foster v. Bank of England* (1846), 8 Q. B. 689.

(g) (1883), 23 Ch. D. 549.

(h) National Debt Act, 1870, s. 10.

Unclaimed Dividends.

The provisions as to the transfer of stock on which no dividend has been claimed for ten years to the National Debt Commissioners, and for retransfer to persons showing title; the method of dealing with the dividends, and other matters connected therewith, are contained in sects. 51 to 63 and 65 to 68 of the National Debt Act, 1870.

Inspection of Books.—Section 52 of the Act provides for the keeping of a list by the Bank of the names in which the stock stood before transfer to the National Debt Commissioners, the residence and description of the parties, the amount transferred and the date of transfer, and enacts that the list shall be open for inspection at the usual hours of transfer, and that a duplicate of the list shall be kept at the office of the National Debt Commissioners.

In *Reg. v. Bank of England* (i) a person who carried on business as a next of kin and unclaimed money agent, applied for a mandamus to compel the Bank to allow him to inspect the list, which they had declined to do. He desired inspection in order to make a copy of the list for the purposes of his business. In the exercise of its judicial discretion with regard to the writ of mandamus, the Court refused to order it to issue, because the applicant did not show that he *bonâ fide* claimed an interest in any unclaimed stock, either on his own behalf or as representing some other person.

Stock Certificates.

The right of a stockholder (j) to obtain a stock certificate, with coupons annexed, entitling the bearer of the coupons to the dividends on the stock, is regulated by the National Debt Act, 1870, ss. 26—28, 30—39, 41, 42, and the following enactments.

Loss or Destruction.—The National Debt (Stockholders' Relief) Act, 1892, provides—

7.—(1.) In the event of the loss or destruction of a stock

(i) [1891] 1 Q. B. 785.

(j) As to the issue of stock certificates

to holders of scrip certificates, see the Finance Act, 1902 (2 Edw. 7, c. 7), s. 11.

certificate or scrip certificate, the Bank, before authorizing the issue of a duplicate, may require—

- (a) evidence to the satisfaction of the Bank of the loss or destruction and ownership of the certificate; and
- (b) a delay of not more than one year from the date of the loss or destruction; and
- (c) the advertisement of the loss or destruction in two or more London or Dublin daily papers (as the case requires); and
- (d) either the transfer of a sum of stock, of a description approved by the governor or deputy-governor of the bank, equivalent to the market value on the day of transfer of the lost or destroyed certificate, and at least six and a-half years' dividends thereon, into the joint names of the governor and deputy-governor, by way of security; or the execution of a bond of indemnity in which the owner shall be joined by one or more responsible persons.

(2.) After the expiration of six years from the date of the transfer of the stock, or of the execution of the indemnity, the person interested may, having duly advertised the facts a second time in two or more London or Dublin daily papers (as the case requires), request the Bank to release the stock or to cancel the indemnity, and on such request being complied with any other claimant shall not have any claim against the Bank, but shall have recourse against the person who obtained the duplicate certificate.

Restriction upon Trustees.—The Trustee Act, 1893 (*k*), provides—

7.—(1.) A trustee, unless authorized by the terms of his trust, shall not apply for or hold any certificate to bearer issued under the authority of any of the following Acts, that is to say :—

- (a) The India Stock Certificate Act, 1863.
- (b) The National Debt Act, 1870.
- (c) The Local Loans Act, 1875.
- (d) The Colonial Stock Act, 1877.

(2.) Nothing in this section* shall impose on the Bank of England or of Ireland, or on any person authorized to issue any

(*k*) 56 & 57 Vict. c. 53.

such certificates, any obligation to inquire whether a person applying for such a certificate is or is not a trustee, or subject them to any liability in the event of their granting any such certificate to a trustee, nor invalidate any such certificate if granted (*l*).

Prohibition of Fees.

The National Debt Act, 1870, provides—

70. No fee, reward, or gratuity shall be demanded or taken for paying any dividend, or for any transfer of stock, or for receiving any certificate or duplicate certificate under Part VI. of this Act (*m*), on pain that any person offending, by demanding or taking any such fee, reward, or gratuity, shall for every such offence forfeit the sum of twenty pounds to the party aggrieved, with full costs of suit, to be recovered in any of Her Majesty's Superior Courts of Law in England or Ireland.

Stamp Duty Excluded.

71. No stamp duty shall be payable in respect of any dividend warrant, transfer of stock, stock certificate, or coupon.

Other Stocks Transferable at Bank.

73. Such of the provisions of Parts III. and IV. of this Act as relate to receipt of dividends and transfer of stock by executors or administrators, and to evidence of title to dividends or stock, and to receipt of dividends on stock standing in the names of infants or persons of unsound mind, and to payment of dividends on stock by sending warrants through the post, shall apply to all stock of any company or corporation, funds, or annuities transferable in the books of the Bank of England or of Ireland (*n*).

(*l*) By the National Debt Act, 1870, s. 30, it is provided that no notice of any trust in respect of any stock certificate or coupon shall be receivable by the Bank of England or of Ireland.

(*m*) As to transfers between England

and Ireland, and loss or destruction of certificates, see sects. 43—50.

(*n*) See also National Debt (Stockholders' Relief) Act (55 & 56 Vict. c. 39), s. 8.

Exchequer Bills and Bonds and Treasury Bills.

These instruments are issued from time to time at the instance of the Treasury, acting upon statutory authority (*o*).

Notwithstanding the prohibition contained in the earlier statutes of loans by the Bank to the Crown on Government securities without the authority of Parliament (*p*), the Bank may lend to the Crown on the credit of these bills (*q*).

Criminal Offences.

Forgery.—The Forgery Act, 1861 (24 & 25 Vict. c. 98), provides—

2. Whosoever shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any transfer of any share or interest of or in any stock, annuity, or other public fund which now is or hereafter may be transferable at the Bank of England or at the Bank of Ireland, or of or in the capital stock of any body corporate, company, or society which now is or hereafter may be established by charter, or by, under, or by virtue of any Act of Parliament, or shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any power of attorney or other authority to transfer any share or interest of or in any such stock, annuity, public fund, or capital stock, or to receive any dividend or money payable in respect of any such share or interest, or shall demand or endeavour to have any such share or interest transferred, or to receive any dividend or money payable in respect thereof, by virtue of any such forged or altered power of attorney or other authority, knowing the same to be forged or altered, with intent, in any of the cases aforesaid, to defraud, shall be guilty of felony, and being convicted

(*o*) See Exchequer Bills and Bonds Act, 1866 (29 Vict. c. 25); Treasury Bills Act, 1877 (40 Vict. c. 2); National Debt Act, 1889 (52 Vict. c. 6), s. 5; Regulations of 31st May, 1899: Statutory Rules and Orders, Revised ed., vol. 8, p. 64; and as examples of temporary provisions for their issue, War Loan Act, 1900 (63 Vict. c. 2), s. 4; Supplemental War Loan

Act, 1900 (63 & 64 Vict. c. 61), s. 1; Supplemental War Loan (No. 2) Act, 1900 (64 Vict. c. 1), s. 1; Consolidated Fund (No. 1) Act, 1903 (3 Edw. 7, c. 3), s. 3; Appropriation Act, 1903 (3 Edw. 7, c. 32), s. 3.

(*p*) 5 & 6 Will. & Mary, c. 20, s. 30; 59 Geo. 3, c. 76, s. 1.

(*q*) 29 Vict. c. 25, s. 30; 40 Vict. c. 2, s. 13.

thereof shall be liable . . . , to be kept in penal servitude for life

4. Whosoever shall forge any name, handwriting, or signature, purporting to be the name, handwriting, or signature of a witness attesting the execution of any power of attorney or other authority to transfer any share or interest of or in any such stock, annuity, public fund, or capital stock, as is in either of the last two preceding sections mentioned, or to receive any dividend or money payable in respect of any such share or interest, or shall offer, utter, dispose of, or put off any such power of attorney or other authority, with any such forged name, handwriting, or signature thereon, knowing the same to be forged, shall be guilty of felony, and being convicted thereof shall be liable to be kept in penal servitude for any term not exceeding seven years

The Forgery Act, 1870 (33 & 34 Vict. c. 58), provides—

3. If any person forges or alters, or offers, utters, disposes of, or puts off, knowing the same to be forged or altered, any stock certificate or coupon, or any document purporting to be a stock certificate or coupon, issued in pursuance of Part V. of the National Debt Act, 1870, or of any former Act, or demands or endeavours to obtain or receive any share or interest of or in any stock as defined in the National Debt Act, 1870, or to receive any dividend or money payable in respect thereof, by virtue of any such forged or altered certificate or coupon, or document purporting as aforesaid, knowing the same to be forged or altered, with intent in any of the cases aforesaid to defraud, he shall be guilty of felony, and being convicted thereof shall be liable to be kept in penal servitude for life

6. If any person forges or alters, or offers, utters, disposes of, or puts off, knowing the same to be forged or altered, any certificate or duplicate certificate required by Part VI. of the National Debt Act, 1870, or by any former like enactment, with intent in any of the cases aforesaid to defraud, he shall be guilty of felony, and being convicted thereof shall be liable to be kept in penal servitude for life (*r*).

(*r*) See also Forgery Act, 1861, s. 7; India Stocks Transfer Act, 1862 (25 & 26 Vict. c. 7), ss. 1, 14; India Stock Certificate Act, 1863 (26 & 27 Vict.

c. 73), s. 13; East India Loan Act, 1869 (32 & 33 Vict. c. 106), s. 13; East India Loan Act, 1898 (61 & 62 Vict. c. 13), s. 8; Metropolitan Board of Works

False Entries.—The Forgery Act, 1861 (24 & 25 Vict. c. 98), provides—

5. Whosoever shall wilfully make any false entry in, or wilfully alter any word or figure in, any of the books of account kept by the Bank of England, or the Bank of Ireland, in which books the accounts of the owners of any stock, annuities, or other public funds which now are or hereafter may be transferable at the Bank of England or at the Bank of Ireland shall be entered and kept, or shall in any manner wilfully falsify any of the accounts of any of such owners in any of the said books, with intent, in any of the cases aforesaid, to defraud; or shall wilfully make any transfer of any share or interest of or in any stock, annuity, or other public fund which now is or hereafter may be transferable at the Bank of England or at the Bank of Ireland in the name of any person not being the true and lawful owner of such share or interest with intent to defraud, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for life . . . (s).

False Dividend Warrant.—The Forgery Act, 1861 (24 & 25 Vict. c. 98), provides—

6. Whosoever, being a clerk, officer, or servant of or other person employed or entrusted by the Bank of England, or the Bank of Ireland, shall knowingly make out or deliver any dividend warrant, or warrant for payment of any annuity, interest or money, payable at the Bank of England or Ireland, for a greater or less amount than the person on whose behalf such warrant shall be made out is entitled to, with intent to defraud, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for any term not exceeding seven years . . . (t).

Misappropriation.—The Larceny Act, 1861 (24 & 25 Vict. c. 96), provides—

73. Whosoever being an officer or servant of the Governor and

Loans Act, 1869 (32 & 33 Vict. c. 102), s. 19; Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 40; Local Loans Act, 1875 (38 & 39 Vict. c. 83), s. 32; Colonial Stock Act, 1877 (40 & 41 Vict. c. 59), s. 21.

(s) Cf. Metropolitan Board of Works Loans Act, 1869 (32 & 33 Vict. c. 102), s. 20.

(t) Cf. Metropolitan Board of Works Loans Act, 1869 (32 & 33 Vict. c. 102), s. 21.

Company of the Bank of England or of the Bank of Ireland, and being entrusted with any bond, deed, note, bill, dividend warrant, or warrant for payment of any annuity, or interest, or money, or with any security, money, or other effects of, or belonging to the said Governor and Company, or having any bond, deed, note, bill, dividend warrant, or warrant for payment of any annuity or interest, or money, or any security, money, or other effects of any other person, body politic or corporate, lodged or deposited with the said Governor and Company, or with him as an officer or servant of the said Governor and Company, shall secrete, embezzle, or run away with any such bond, deed, note, bill, dividend, or other warrant, security, money, or other effects as aforesaid, or any part thereof, shall be guilty of felony, and being convicted thereof shall be liable to be kept in penal servitude for life

CHAPTER XI.

COMPANIES ESTABLISHED ABROAD.

A BANKING corporation duly created in any part of the British Empire, or under the authority of any foreign government recognised by the Crown, is regarded as a corporation in this country, and can sue and be sued as such in the English Courts. It may carry on business in this country in its corporate name, and enter into any transaction within its powers as limited by its constitution and which is permissible under the law of England (*a*).

A company, however, which is not incorporated cannot sue or be sued in the name of an officer in this country, although empowered to do so in the country of its creation : because procedure is governed by the law of the country in which the action is brought (*b*).

But the members, resident in England, of a company formed for the purpose of carrying on business in a place out of England, are bound, in respect of the transactions of that company, by the law of the country in which the business is carried on. Accordingly, a statute authorizing an unincorporated company to sue and to be sued

(*a*) Dicey's Conflict of Laws, pp. 485, 486.—In *Gladstone v. Ottoman Bank* (1863), 1 H. & M. 505; 32 L. J. Ch. 228; 9 Jur. N. S. 246; 8 L. T. 162, a bill was filed against the Ottoman Bank, its directors and the Sultan, alleging that the Sultan's government had granted to the plaintiffs the exclusive right of issuing bank-notes in Turkey, and had subsequently in derogation of that grant made a similar concession to the defendants, and praying a declaration of the plaintiffs' exclusive right, and an

injunction against the Ottoman Bank and its directors. It was held that, inasmuch as the Court had no jurisdiction upon the contract as against the Sultan, it had none against the bank and its directors. Cf. *Emperor of Austria v. Day* (1861), 30 L. J. Ch. 690; *In the matter of Wadsworth and the Queen of Spain* (1851), 17 Q. B. 171.

(*b*) *Alivon v. Furnival* (1834), 1 Cr. M. & R. 277; *Aldridge v. Cato* (1872), L. R. 4 P. C. 313.

in the name of its chairman, constitutes the chairman, when so suing or so sued, an agent for the members of the company in the affairs of the company. Moreover, the members of a company formed for the purpose of carrying on business in a colony, are not discharged from liability on judgments obtained in the colony against the chairman, by reason of their having been resident in England, not being served with process, and having received no notice of the proceedings (c).

By an Act of the colonial legislature of New South Wales it was provided that a banking company should sue and be sued in the name of its chairman, and that execution on any judgment against the company might be issued against the property of any member for the time being, in like manner as if such judgment had been obtained against such member personally. In assumpsit against a member of the company on a judgment obtained in the colony against the chairman, it was held, that the colonial legislature had authority to pass the Act, and that there was nothing repugnant to the law of England, or to natural justice, in enacting that actions on contracts made by the company in the colony, instead of being brought against the shareholders individually, should be brought against the chairman whom they had appointed to represent them; that a judgment recovered in such an action, after service of process on the chairman, had the same effect beyond the territory of the colony which it would have had if the defendant had been personally served with process, and that, he being a party to the record, the recovery had been personally against him (d).

Upon the subject of the personal liabilities of the members of foreign companies, it is said in Lindley on Companies (e): "If a company is incorporated by a foreign government so that by the constitution of the company the members are rendered wholly irresponsible, or only to a limited extent responsible, for the debts

(c) *Bank of Australasia v. Harding* (1850), 9 C. B. 661.

(d) *Bank of Australasia v. Nias* (1851), 16 Q. B. 717.—As to the liability in England of the members of a banking company constituted in Calcutta under

an Act passed in India, see *Kelsall v. Marshall* (1856), 26 L. J. C. P. 19; 1 C. B. N. S. 241.

(e) 6th ed., p. 1227, cited in Dicey's *Conflict of Laws* at p. 486.

and engagements of the company, the liability of the members, as such, will be the same in this country as in the country which created the corporation. But with respect to unincorporated companies, the measure of liability in respect of any given transaction seems, upon principle, to depend upon the law of the place where the transaction in question occurred (*lex loci contractus*). The law of agency, as administered in that place, would, it is conceived, have to be applied, and the law of the place where the company might be considered as domiciled would only be material for the purpose of determining the authority given by the members to the agents by whom the transaction in question was conducted."

A company incorporated under the law of a foreign state can be wound up in England under sect. 199 of the Companies Act, 1862, if it has an office and assets in this country (*f*).

(*f*) *In re Syria Ottoman Railway Co.* (1904), 20 T. L. R. 217.

Part II.

THE ACCOUNT.

CHAPTER I.

OPENING THE ACCOUNT.

IN so far as it is possible that an account which it is proposed to open may be overdrawn, the considerations which are hereafter dealt with under the title of "The Real Customer" in Part VIII. Chap. 3, become important.

Apart from this, the main consideration of a legal nature, is the signature which the banker is instructed to honour. This must obviously be ascertained in order that the banker may be in a position to deal with cheques and other drafts presented for payment, and those questions arising in connection therewith which are considered in Parts III. and IV.

Infants.—No serious difficulty, so long as the account is not overdrawn, is likely to arise in practice with regard to the minority of a customer (*a*).

Persons of Unsound Mind.—Naturally a banker would not knowingly open an account for a person of unsound mind. If he did, he might easily be involved in the difficulty of choosing between the risk of unjustifiably dishonouring the customer's cheque on the one hand, and of being held to have debited his account without adequate authority on the other (*a*).

(*a*) See further upon the subject of incapacity, p. 604, *infra*.

Married Women.—If an account is opened for a married woman, the banker will be justified, in the absence of notice to the contrary, in treating it as being to all intents and purposes her own.

In *In re Montague, Ex parte Ward (b)*, a bank had opened an account for a married woman. Her husband became bankrupt, and upon a claim by his trustee, it was declared by the Court that, upon the facts, the account was the husband's. Between the date of the receiving order and this declaration the banker had honoured cheques drawn by the wife. The trustee claimed to recover their amount from the banker. But Vaughan Williams, J., held that, the account having been, so far as the contract with the banker was concerned, the account of the wife, and the moneys having been paid before the trustee had obtained any declaration of his right, the banker had a good discharge.

In this case it appeared that when the wife opened the account her husband was present and said: "I shall initial all cheques drawn by my wife; she is such a generous woman, and this will be a check." She signed the signature book and he initialled the entry. Nevertheless, the learned judge held that this was merely an arrangement made by the wife's direction to insure that she had her husband's counsel when she was drawing money, and that at any time she would have had a right to say to the bank: "From this time forward honour my cheques without my husband's initials." It is, however, submitted that a contrary inference would have been better justified by these facts, and that, to this extent, the case cannot be treated as a safe guide (c).

Partners.—One member of a trading firm can apparently bind the partnership by opening an account in the firm-name (d); or by assenting to a transfer of the partnership account from their banker to his successor in business (e).

(b) (1897), 76 L. T. 203.

(c) See per Kekewich, J., in *In re Barney, Barney v. Barney*, [1892] 2 Ch. 265, at p. 276, cited in Part III. Chap. 6; and cf. *Twibell v. London Suburban Bank*, W. N. (1869) 127, cited in the same chapter.

(d) This appears to follow from his general authority to do what is usual in the ordinary course of the partnership business, and especially his power of borrowing money on the credit of the firm.

(e) *Beale v. Caddick* (1857), 2 H. & N. 326.

But he cannot, by opening a banking account in his own name on behalf of the partnership, bind the firm to the state of that account whatever it may be (*f*).

The fact, however, of an account having been opened by one of two partners in his own name is not conclusive to show that the account was opened on his own behalf. It may be proved that he was acting as the agent of the partnership and that the account was theirs (*g*).

Corporations.—In the case of a corporation, the banker should satisfy himself that, under its regulations—whether contained in a private Act, a charter, articles of association, a deed of settlement, or elsewhere—the person or persons communicating with him have power to bind the corporation by opening the account, and that the signatures which he is directed to honour are those of persons empowered to draw cheques on its behalf (*h*).

The subject of the signature of cheques is considered in detail in Part III. Chap. 6.

(*f*) *Alliance Bank v. Kearsley* (1871), 746.

L. R. 6 C. P. 433.

(*h*) See Part III. Chap. 6, and Part

(*g*) *Cooke v. Seeley* (1848), 2 Exch. VIII. Chap. 3.

CHAPTER II.

PAYMENTS IN.

The Relation Constituted.

MONEY paid into a current account is lent by the customer to the banker. From the moment of payment in it becomes the property of the banker, who is thenceforth bound to honour the customer's cheques up to its amount.

Accordingly, so far as concerns money upon a current account, the banker is neither the trustee, the factor, nor the agent of his customer, but only his debtor, liable to repay the loan by honouring the customer's cheques.

The normal relations between a banker and his customer were fully expounded in *Foley v. Hill* (a).

"Money," said Lord Chancellor Cottenham in that case, "when paid into a bank, ceases altogether to be the money of the principal; it is then the money of the banker, who is bound to return an equivalent by paying a similar sum to that deposited with him when he is asked for it. The money paid into the banker's is money known by the principal to be placed there for the purpose of being under the control of the banker; it is then the banker's money; he is known to deal with it as his own; he makes what profit of it he can, which profit he retains to himself, paying back only the principal, according to the custom of bankers in some places, or the principal and a small rate of interest, according to the custom of bankers in other places. The money placed in the custody of a banker is, to all

(a) (1848), 2 H. L. C. 28, at pp. 35—38.

intents and purposes, the money of the banker, to do with it as he pleases; he is guilty of no breach of trust in employing it; he is not answerable to the principal if he puts it into jeopardy, if he engages in a hazardous speculation; he is not bound to keep it or deal with it as the property of his principal; but he is, of course, answerable for the amount, because he has contracted, having received that money, to repay to the principal, when demanded, a sum equivalent to that paid into his hands. That has been the subject of discussion in various cases, and that has been established to be the relative situation of banker and customer. That being established to be the relative situations of banker and customer, the banker is not an agent or factor, but he is a debtor."

In a later portion of his judgment his Lordship pointedly guarded against the misconception arising from the use of the word "deposit" in connection with moneys paid to a banker. "If . . . a sum of money had been deposited with the banker,—I will not say," he added, "deposited, but paid to the banker—on account of the customer."

"I am now speaking," said Lord Brougham, "of the common position of a banker, which consists of the common case of receiving money from his customer on condition of paying it back when asked for, or when drawn upon, or of receiving money from other parties, to the credit of the customer, upon like conditions to be drawn out by the customer, or, in common parlance, the money being repaid when asked for, because the party who receives the money has the use of it as his own, and in the using of which his trade consists, and but for which no banker could exist, especially a banker who pays interest. But even a banker who does not pay interest could not possibly carry on his trade if he were to hold the money, and to pay it back, as a mere depository of the principal. But he receives it, to the knowledge of his customer, for the express purpose of using it as his own, which, if he were a trustee, he could not do without a breach of trust. It is a totally different thing if we are to take into consideration certain acts that are often performed by a banker, and which put him in a totally different capacity, for he may, in addition to his position of banker, make

himself an agent or a trustee towards a *cestui que trust*; for example, suppose I deposit exchequer bills with a banker, and he undertakes to receive the interest upon them, or undertakes to negotiate or make sale of those exchequer bills, and to credit my account with the proceeds of the sale, I do not stay to ask whether, in that case, he might not be in the position of a trustee, and might not partly sustain a fiduciary character (*b*), but he does that incidentally to his trade of a banker; for his trade of a banker is totally independent of that—his trade of a banker consists in the general trade, to which the other is an accidental addition. This trade of a banker is to receive money and use it as if it were his own, he becoming debtor to the person who has lent or deposited with him the money to use as his own, and for which money he is accountable as a debtor. That being the trade of a banker, and that being the nature of the relation in which he stands to his customer, I cannot, without breaking down the bounds between equity and law—without, as it were, removing the landmarks of jurisprudence—I cannot at all confound the situation of a banker with that of a trustee, and conclude that the banker is a debtor with a fiduciary character” (*c*).

Statute of Limitations.—It has been held to follow from the treatment of money paid to a banker as a loan to him by his customer that, if for six years after it is credited to his account, no cheque drawn by the customer is presented, and no interest is credited to his account, nor any acknowledgment in writing of indebtedness to the customer is made by the banker, the Statute of Limitations will be a bar to the recovery of the amount by the customer (*d*). But it is submitted that this determination requires reconsideration. The contract of the banker is to honour cheques drawn by his customer, and it may well be argued that, until a

(*b*) See Part V. Chap. 7.

(*c*) It was accordingly held that where his account was not long or complicated a customer could not maintain a bill for an account in equity. Cf. Lord Justice Turner's judgment in *Smith v. Leveaux*

(1863), 2 De G. J. & S. 1, at p. 5; *Bowles v. Orr* (1835), 1 Y. & C. Ex. 464.

(*d*) *Pott v. Clegg* (1847), 16 M. & W. 321. See also *Bridgman v. Gill* (1857), 24 Beav. 302.

cheque is presented and dishonoured, the statute does not begin to run (e).

Position on Banker's Insolvency.

General Rule.—It follows from what has been said above that the customer has no right *in rem* to money paid into his account in the usual course of business. If, therefore, the banker fails the customer will only have a right of proof for the amount due to him. Even if the money paid in is, in fact, still in the coffers of the bank the customer will ordinarily have no specific right to it against the trustee in bankruptcy.

In *Ex parte Clutton, In re Nash and Neale* (f), money was paid into a bank, through the manager, on Saturday evening after office hours. On the same evening one of the partners made a declaration of insolvency in the absence and without the knowledge of his partner. The bank never again opened for business, and the other partner concurred in allowing it to remain closed. Both partners were subsequently adjudicated bankrupts. It was held that the money passed to the assignees.

Payment to Branch after Stoppage of Head Office.—In *In re Agra and Masterman's Bank* (g) a firm paid a cheque into a branch bank in India to their current account after the stoppage of the parent bank in England, but before the branch had notice of that stoppage. Afterwards on the same day the branch received notice of the stoppage of the bank in England, and stopped itself. An application by the firm to the Court to be repaid the amount of the cheque in full out of the estate of the banking company which was being wound up was refused. The applicants were, however, given liberty to renew their application if it should appear that their cheque had not been cashed until after the branch had received notice of the stoppage of the bank in England.

Vice-Chancellor Wood, in giving judgment, pointed out that "it was clear that after a bank had ceased all functions it could not

(e) Cf., moreover, the observations of pp. 41 and 42.
 Lords Cottenham and Brougham in (f) (1850), Fon. 167.
Foley v. Hill (1848), 2 H. L. C. 28, at (g) (1866), 36 L. J. Ch. 151.

receive anything in specie for a special purpose, if the special purpose had become impossible; but all the cases in which questions as to payment in of money for a special purpose had arisen, were cases in which a sum of exact amount had been specifically appropriated to a special purpose, which purpose had failed, and therefore the money had remained to the owner. The ordinary case of banking was different: there persons lent money to their bankers for the convenience of having it repaid in dribblets as they wanted it. The relation between a banker and his customer was merely that of debtor and creditor. That ordinary banking transactions constituted only a debt, and not a trust, was clear from this, that if you had paid into your bank 100,000*l.* one day, and the next the banker chose to invest this sum in any speculative concern, you could not file a bill against him to restrain him from so doing" (*h*).

Money Held for Customer.—Money held apart by the banker as the property of his customer will not come within the general rule as to payments in.

In *Sadler v. Belcher* (*i*) by the custom of a bank money paid in after banking hours was put into a separate place of deposit, and entered in a counter-book, but not carried to the customer's account till the next day. A customer having paid in a bank-note after the banking hours, the banker, having before resolved not to open his bank again, placed the note in such separate place of deposit without carrying it to the account of the customer. The next morning he stopped payment and became bankrupt. Lord Abinger, C. B., expressed the view that the bank-note remained the property of the customer. "Having been placed apart by the bankers, after they had come to a resolution not to open their bank again, it must be taken that they dealt with it as property held by them on behalf of the plaintiffs, unless some unlooked-for contingency should occur before the next morning which might

(*h*) See also *In re Oriental Bank Corporation, Ex parte Guillemin* (1884), 26 Ch. D. 634; 1 T. L. R. 9, where a customer had purchased in Mauritius a draft by the local branch on the London

head office of the bank after the stoppage of the latter, but before the former had received notice of it.

(*i*) (1843), 2 M. & Rob. 489.

enable them to alter their resolution." Sir F. Pollock, A.-G., who appeared for the defendants, the assignees in bankruptcy, thereupon submitted to a verdict for the plaintiffs.

In *Threlfal v. Giles* (*k*) the plaintiff had, after banking hours, deposited a large sum with the manager of Warwick & Co.'s bank at their house of business. The manager knowing that the bank was on the eve of stopping, although no resolution to that effect had been formally come to by the bankers, put the money in a place by itself, separate from the funds of the house, and the bank never after that day opened for business. Abbott, L. C. J., was of opinion that the plaintiff was entitled to recover.

So, also, if money paid by a customer to his banker in the country, in order that it may be sent to his agent and applied in making a particular payment, has reached the hands of the agent before the bankruptcy of the country banker, the customer and not the trustee will be entitled to it (*l*).

As to the position generally where a customer has paid money to his banker for the express purpose of having it applied in payment to a third party, and as to the property in drafts pending collection, reference should be made to Part IV. Chaps. 7 and 8, and Part V. Chap. 7.

Conditional Payment.—When money is paid to a banker to be placed to the credit of another upon a condition being fulfilled, but in the meantime to stand in the banker's books in the name of the party paying it in, it is at the risk of the latter, and the loss is his, if the banker fails before the condition is complied with (*m*).

Crediting the Account.

Apart from any express agreement or special course of business between the banker and his customer, a sum paid into the account, or the proceeds of a draft handed in for collection, should be

(*k*) Cited in the argument for the plaintiffs in the case last cited, at p. 492 of the report.

(*l*) *Farley v. Turner* (1857), 26 L. J. Ch. 710, cited in Part IV. Chap. 7. Cf.

In re Barned's Banking Co., Massey's Case (1870), 39 L. J. Ch. 635, in which the decision seems of doubtful authority.

(*m*) *Calley v. Short* (1815), Coop. Ch. Ca. 148.

credited to the customer within a time which, according to the course of business, is reasonably sufficient for the purpose. In the case of a draft, the banker is not bound to credit its amount until he has received it, and has had a reasonable time thereafter for making the entry.

But a special agreement, or the course of business which has previously prevailed between the banker and his customer, may render it the duty of the former to credit the account upon a different principle.

The above propositions are established by the following cases.

In *Marzetti v. Williams* (*n*) the plaintiff was a wine merchant and ship broker, and he kept an account with the defendants, who were bankers in London. The balance in his favour on the evening of the 17th December, 1828, was 69*l.* 19*s.* 6*d.* A few minutes before eleven o'clock on the morning of the 19th a Bank of England note for 40*l.* was paid into his account. About ten minutes to three o'clock on the same day a cheque, drawn by the plaintiff in favour of Sampson and Hooper for 87*l.* 7*s.* 6*d.*, was presented at the defendant's bank for payment. The clerk to whom it was presented, after having referred to a book, said there were not sufficient assets, but that the cheque might probably go through the clearing-house. The cheque was paid on the following day. Under these circumstances, it was held that the plaintiff was entitled to recover damages, although he had not proved that he had sustained any actual damage through the conduct of the defendants.

"This action," said Lord Chief Justice Tenterden, "is, in fact, founded on a contract, for the banker does contract with his customer that he will pay cheques drawn by him, provided he, the banker, has money in his hands belonging to that customer. Here that contract was broken, for the defendants would not pay the cheque of the plaintiff, although they had in their hands money belonging to him, and had had a reasonable time to know that such was the fact." "This case . . . must be considered," said Mr. Justice Parke, "as if the action were founded on a contract by

(*n*) (1830), 1 B. & Ad. 415.

the bankers to pay all drafts presented within a reasonable time after they receive such money, so as to allow them to pass it to their customers' account." And Mr. Justice Taunton added: "The jury have found that, when the cheque was presented for payment, a reasonable time had elapsed to have enabled the defendants to enter the 40*l.* to the credit of the plaintiff, and, therefore, that they must or ought to have known that they had funds belonging to him. . . . The case put in argument, of the holder of a cheque being refused payment, and called back within a few minutes and paid, is an extreme case, and a jury probably would consider that as equivalent to instant payment. That, however, is not the present case. Here the refusal to pay was not countermanded till the following day" (o).

The facts in *Bransby v. East London Bank* (p) sufficiently appear from the judgment of Keating, J.: "The plaintiffs had entered into an agreement with the bank that they should be allowed to draw cheques upon it, or that they would discount their bills, provided the plaintiffs kept a balance in their hands of 100*l.* Now, on the morning of the 13th of May, which was a Saturday, the plaintiffs' balance was less than 100*l.*, but about eleven o'clock of that day one of the plaintiffs paid into the bank a cheque for 150*l.*, drawn on Sir Claude Scott's bank. Later in the day the plaintiffs drew a cheque for 17*l.* odd in favour of a Mr. Lake, which was delivered to him after banking hours, and which cheque is the subject of the present action. Mr. Lake presented this cheque on the Monday morning between ten and eleven, but the bank refused to cash it. Somewhere about the same time, but whether before or after Mr. Lake called has not been clearly made out, one of the plaintiffs called, and having looked at their pass-book saw that the 150*l.* had been entered to their credit as cash. After he left the bank he heard that the cheque presented by Mr. Lake had been dishonoured, and upon his returning to the bank and asking for an explanation he was told that the walking-clerk had left the bank for the clearing-house before the 150*l.* cheque

(o) See also *Forman v. Bank of England* Chap. 2.

(1902), 18 T. L. R. 339, cited in Part V.

(p) (1866), 14 L. T. 403.

had been paid in, and had not returned on the Monday morning when the cheque was presented by Mr. Lake; consequently it was not known whether Sir Claude Scott's bank had cashed the large cheque. This was the reason given at the trial, and I believe it to be the true one; and I think, therefore, the learned judge was right in saying that there was no evidence that the bank had a balance in hand available for paying the cheque, and, if that really were so, we should have no difficulty in discharging the rule (q). There, however, appears to be some doubt as to whether there was, or was not, evidence to go to the jury that the cheque for the 150*l.* had been actually cashed when the cheque was presented by Mr. Lake, and the walking-clerk was not called to show at what time that cheque really was cashed. Under these circumstances, I am of opinion that the case should again be inquired into, in order to call evidence to show when the cheque was cashed."

Montague Smith, J., added: "I agree that there is some evidence that the bank had funds. The cheque was paid in on Saturday, and it was undoubtedly entered as cash in the pass-book to the credit of the plaintiffs. *Primâ facie* the bank had received the money, and if the plaintiffs have acted on the entry in the pass-book, I think the defendants are estopped from denying that they had funds. I think, however, that the defendants ought to have shown when the cheque was cashed, and that the case ought to go back again for trial, in order that evidence may be given on that point" (r).

In *Armfield v. London and Westminster Bank* (s) the plaintiff sued the defendants for wrongfully refusing to pay a bill of exchange accepted by him payable at their bank. The defence was that the bank had not sufficient funds in hand to meet the bill without crediting the plaintiff with the proceeds of cheques

(q) The plaintiff had been nonsuited and a rule for a new trial granted.

(r) If the defendants were estopped from denying that the cheque had been cashed they would, *ex hypothesi*, have been precluded from calling evidence upon the point. Probably the learned

judge meant that, whether the plaintiffs had acted on the faith of the entry in the pass-book, and if this were not established in their favour, when the cheque was in fact cashed, were the real questions in the case.

(s) (1883), 1 Cab. & E. 170.

paid in to his account upon the day the bill became due. The plaintiff said it had been the invariable custom during the twenty years he had banked with the defendants to treat cheques so paid in as cash. They denied that this was an invariable practice with them, and contended that they had a right to exercise a discretion as to whether they would treat particular cheques before clearance as cash or not.

Cave, J., left it to the jury to say whether it was the course of business between the plaintiff and defendants that cheques before clearance would be treated as cash (*t*).

If the account be overdrawn at the time of the presentation of the cheque, the banker need not honour it, although he has frequently permitted the customer to overdraw on previous occasions (*u*).

Crediting Cheques as Cash.—In *Capital and Counties Bank v. Gordon* (*v*) Lord Lindley said: “The moment a bank places money to its customer’s credit the customer is entitled to draw upon it, unless something occurs to deprive him of that right” (*w*).

In the same case, when before the Court of Appeal, Lord Justice Mathew said (*x*): “In such a case the cheques are received on the terms that the amount shall be credited in account, and that, if the cheque is subsequently dishonoured, the customer may be debited with the amount of it; but no one can doubt that, as was held in *Royal Bank of Scotland v. Tottenham* (*y*), the bank would be in a position, in the event of the insolvency of the customer, to sue the other parties to the cheque upon it. The case of *Royal Bank of Scotland v. Tottenham* indicates the course of business in such cases” (*z*).

There is an important difference (*a*) between the position of a banker who at once credits his customer with the face value of a

(*t*) As to the effect of the course of business, see further Chap. 7 of this Part.

(*u*) *Ritchie v. Clydesdale Bank* (1886), 13 S. Sess. Cas. (4th ser.) 866. See also *Kymer v. Laurie* (1849), 18 L. J. Q. B. 218, cited in Part III. Chap. 1.

(*v*) [1903] A. C. 240, at p. 249.

(*w*) See further upon this subject, Chap. 8 of this Part.

(*x*) [1902] 1 K. B. 242, at p. 283.

(*y*) [1894] 2 Q. B. 715.

(*z*) See also *Gillespie v. International Bank of London* (1888), 4 T. L. R. 322; and Part V. Chap. 9.

(*a*) Which, however, is likely to be removed by Parliament.

cheque paid in to his account and allows him to draw against his credit balance thus increased, and his position when, without crediting the customer with the value of the cheque before collection, he allows him to overdraw his account in view of the anticipated credit. In the former case he is not protected by sect. 82 of the Bills of Exchange Act if the customer had no title or a defective title thereto (*b*).

The Person Credited.—It is, of course, essential that the banker should give the credit for money paid in to him to the right person. In order to ensure this special circumspection or enquiry may occasionally be necessary.

Thus, in an American case (*c*), two persons came into a bank, one of them carrying a box containing money. The other told the cashier that it was to be placed to his credit, and this was done. It appeared that the former, who was the party entitled to the money, owing to deafness, did not hear what passed. A jury found that the mistake was attributable to the omission of proper enquiry by the bank; and the Supreme Court of New York upheld their verdict against the bank (*d*).

(*b*) *Capital and Counties Bank v. Gordon*,
[1893] A. C. 240. See further upon this
subject, Part V. Chap. 9.

(*c*) *Winter v. Bank of New York* (1805),
2 Caines (N. Y.), 337.

(*d*) See also *Jackson Insurance Co. v.*
Cross (1873), 9 Heisk. (Tenn.) 283.

CHAPTER III.

POSITION OF BANKER AS TO TRUST MONEYS.

General Proposition.

A BANKER must not knowingly be a party to the application of trust moneys to any purpose inconsistent with the trusts affecting them. But if, at the time of receiving them, he had no notice of the trusts, and thereafter, before receiving such notice, he has, excluding them from the account, become the creditor of his customer, he will be entitled *pro tanto* to retain them, even after receiving notice of the trusts.

Notice of Trusts.

Notice at Time of Receipt.—A banker who receives into his possession moneys of which his customer has, to his knowledge, become the owner in a fiduciary character, contracts the duty not to part with them, even at the mandate of his customer, for purposes which he knows are inconsistent with the customer's fiduciary character and duty (a).

If, indeed, the banker has knowledge of the misapplication of trust money received by his customer and paid to him, he is just as much liable for the amount as if he had himself been nominated a trustee of the money and it had come into his hands as such (b).

Even if he gives up a security for an overdraft in consideration of receiving another security which he knows is trust property, he will be liable to restore the latter (c).

(a) *Ex parte Adair, In re Gross* (1871), *West of England Bank* (1885), 1 T. L. R. 24 L. T. 198. 522.

(b) *In re Wall, Jackson v. Bristol and* (c) *Ibid.*

The knowledge of an officer of the bank, acting in the matter within the scope of his authority—for example, the manager of a branch advancing money to a customer of that branch—will have the same consequences as knowledge by the members of a banking firm or the directors of a banking company (*d*).

Where an account has been opened expressly as a trust account, no question can arise as to the banker's knowledge of the existence of the trusts. In other cases it is a question of fact whether or not he was aware of the character of the funds received by him.

Trust Account.—Where a customer has opened with his banker separate accounts, specially headed with the names of the trusts to which the moneys paid into those accounts belong, the banker is not at liberty, upon the bankruptcy of the customer, to apply those moneys in payment of the customer's overdrawn private account (*e*).

In *Bridgman v. Gill* (*f*) a fund was standing to the account of two trustees in the books of bankers who had notice that it was a trust fund. By the direction of the tenant for life alone, they transferred it to his account, and thereby obtained payment of a debt due from him to them. It was held that the trustees might sue the bankers to have the fund replaced.

In *Magnus v. Queensland National Bank* (*g*) G., a stockbroker, who was one of three trustees and acted as broker to the trust, proposed to his co-trustees to sell B. stock belonging to the trust and re-invest in N. E. stock. The three trustees then, on the 27th of January, 1882, executed a transfer of the B. stock for a nominal consideration to two persons who were officers of a bank of which G. was a customer. G. gave the transfer to the bank as security for a loan by them to him, and the transfer was registered. G., in February, 1882, paid off the loan, and on the 15th of February the bank transferred the stock to purchasers from G., and, without giving notice to G.'s co-trustees, allowed him to

(*d*) See per Knight-Bruce, L. J., in *Collinson v. Lister* (1855), 7 De G. M. & G. 634, at p. 637.

(*e*) *Ex parte Adair, In re Gross* (1871),

24 L. T. 198.

(*f*) (1857), 24 Beav. 302. Cf. *Pannell v. Hurley* (1845), 2 Coll. 241.

(*g*) (1888), 37 Ch. D. 466.

receive the purchase-money. He invested it in N. E. stock in his own name. In 1883 he sold the N. E. stock and misappropriated the proceeds. Shortly after the sale of the B. stock G. had given an account to his co-trustees showing the sale of B. stock and a re-investment in N. E. stock, and in 1884 he rendered another account in which he represented the N. E. stock as still forming part of the trust funds. In 1885 he absconded. The co-trustees remembered hardly anything about the transaction, but admitted the genuineness of their signatures to the deed of transfer. It was held that the bank had occasioned the loss to the trust estate by allowing the purchase-money to come to the hands of G., who had no authority to receive it, and whom they had no sufficient reason for believing to have authority to receive it, and that the bank must therefore make it good at the suit of the co-trustees, although the co-trustees had been negligent in not seeing that the N. E. stock was registered in the joint names of the trustees.

Executors' Account.—If, by direction of a customer, bankers apply a fund which they know to be part of the assets subject to the provisions of a will of which the customer is executor, in satisfaction of advances made by them in the course of trade to relieve the embarrassments of their customer, they will be answerable for the fund so applied to the creditors of the estate and the beneficiaries under the will (*h*). It will be the same whether the fund has been transferred in payment of an antecedent debt of the trustee or executor, or to secure new advances of money intended by him to be misapplied, provided the misappropriation or intended misappropriation be known to the bankers (*h*).

In *Child & Co. v. Thorley* (*i*) one of two executors, who was himself a residuary legatee, opened an account with a banker in his own name for executorial purposes, and the banker, with notice of the dispositions under the will, made advances to the executor for payments connected with the executorship, and securities were deposited for repayment of the advances. The co-executor assented

(*h*) *Wilson v. Moore* (1834), 1 My. & K. 126 and 337; followed in *Foxton v. Manchester, &c. Banking Co.* (1881), 44 L. T. 406.
 (*i*) (1880), 16 Ch. D. 151.

to the first advance, but upon a second advance being made to the acting executor upon other securities, he withdrew his assent, and objected to the banker being repaid out of the trust property, on the ground that the money had been placed to the separate account of the acting executor. The advances were duly applied to the purposes of the administration. Upon an action being brought by the banker for a lien upon the second securities for repayment of his advances, it was held that the banker was justified in advancing money to the acting executor for executorial purposes, and that the assent of the co-executor in the first instance was a further justification for placing confidence in the acting executor and in making further advances to him. The repayment was therefore decreed with mortgagee's costs.

Estate Account.—In *Bodenham v. Hoskyns* (*k*) a solicitor, who was employed by the plaintiff as his receiver and agent in respect of an estate, and who had a private account at his banker's, opened another with the same bankers in the name of the estate, under such circumstances as to inform the bankers that the money which would be paid into that account would belong to the owner of the estate. The receiver drew a cheque on the estate account, and paid it into his private account. It was held that the bankers were liable to repay the amount to the owner of the estate.

Accounts of Public Official.—In *Ex parte Kingston, In re Gross* (*l*), G., a county treasurer, used to pay the county moneys into the B. Bank, but kept his private account at the N. & P. Bank, and carried over the police rates to this account by cheques drawn on the B. Bank. In February, 1869, he opened a separate account with the N. & P. Bank, headed "Police Account." Some of the items to his credit in this account could be traced as having come from county funds, but most of them could not. The cheques which he drew upon it were all headed "Police Account," and appeared to have been drawn only for county purposes. For the purposes of interest the N. & P. Bank treated the accounts as one account, and the interest on the balance in his favour was carried

(*k*) (1852), 2 De G. M. & G. 903.

(*l*) (1871), 6 Ch. 632.

to the credit of his private account. At the time when the police account was opened the manager of the bank knew that G. was county treasurer, and understood that he had been in the habit of paying county moneys into the bank. On the 8th April, 1870, G. absconded, his private account being overdrawn, and the police account being in credit. It was held that the bank was not entitled to set-off the one account against the other, but that the county magistrates were entitled to recover the balance standing to G.'s credit on the police account.

"If," said Lord Justice Mellish in giving judgment, "an account is in plain terms headed in such a way that a banker cannot fail to know it to be a trust account, the balance standing to the credit of that account will, on the bankruptcy of the person who kept it, belong to the trust. The banker need not open such an account unless he pleases . . . and if the customer, when his general account is overdrawn, asks that it may be further overdrawn for the purpose of paying money into the trust account, the banker is entitled to refuse such accommodation" (*m*).

Company's Accounts.—In *Greenwell v. National Provincial Bank* (*n*) the defendants were the bankers of a company, and as such received a money deposit from an applicant for shares in the company, and placed it to a separate account kept for such deposits. At the request of the company and on receiving notice of allotment to the applicant of the shares in respect of which the deposit had been paid, which allotment was invalid, the bank transferred the deposit to the overdrawn general account of the company, with knowledge that a meeting had been held with the object of winding-up the company, and that its reconstruction was contemplated, and in spite of notice from the applicant not to part with

(*m*) So, in *Rex v. Ward* (1836), 2 Ex. 301, note, where a tax-collector had been accustomed to pay money received on account of taxes to R., who paid the same into his banker's to his private account, the banker knowing the circumstances, and the latter became in-

solvent, it was held that an extent in chief might be issued against him for the recovery of the Crown moneys, the amount being a question for a jury. See also *Reg. v. Adams* (1848), 2 Ex. 299.

(*n*) (1883), Cab. & E. 56.

the deposit without his authority. The bank was held liable to repay the amount of the deposit to the applicant (*o*).

Separate Accounts generally.—The ordinary right of a bank to repay itself the advances made to a customer out of any funds paid into that customer's account is not affected by the fact that such funds are proved to have been trust moneys, where it is not shown that the account into which they were paid, although a separate account from the customer's ordinary account, was opened or kept open for the purpose of receiving trust moneys, or that in fact to the knowledge of the bank the moneys were trust funds (*p*).

Business Accounts.—So knowledge on the part of the banker of the fact that his customer's practice is to pay in to his account moneys received on behalf of his clients or customers will not amount to notice that any specific sum paid in by him is a trust fund.

Auctioneer's Account.—In *Marten v. Roche, Eyton & Co.* (*q*) an auctioneer was in the habit of paying the proceeds of sales of cattle into his general account at the defendant's bank, and by means of cheques on the bank he paid the vendors the price received by him for their cattle, after deducting therefrom his commission, and the amount, if any, due from a vendor who had made purchases at the sale. After a large sale had been held, and the proceeds paid in by the auctioneer to his account, the bankers appropriated the sum so paid in to discharge an overdraft on the auctioneer's account, though they knew how the money had come to their customer's hands and the purpose for which he meant to apply it. It was held by Mr. Justice North that a vendor of cattle could not recover from the bankers the amount received by the auctioneer as the price of his stock and paid into the bank.

Stockbroker's Account.—In *Thomson v. Clydesdale Bank, Limited* (*r*),

(*o*) See *Bank of New South Wales v. Goulburn, &c. Proprietary*, cited at p. 158, *infra*; and Part VIII. Chap. 3.

(*p*) *Union Bank of Australia v. Murray-Ainsley*, [1898] A. C. 693. See also

T. & H. Greenwood Teale v. William Williams, Brown & Co., cited at p. 157, *infra*.

(*q*) (1885), 34 W. R. 253; 53 L. T. 946.

(*r*) [1893] A. C. 282.

which, although a Scotch appeal, may be treated as an authority on English law, the appellants were the trustees of Thomas Dunlop, deceased. They held fifty shares in the Commercial Bank of Scotland, which they resolved to sell with a view to another investment. They accordingly, in February, 1890, instructed Thomson, a stockbroker in Edinburgh, to sell the shares and to deposit the proceeds in certain colonial banks in the names of the appellants. The shares were sold by Thomson, and the sum realized was paid in by him to his account with the respondent bank. The transaction was carried out in the ordinary way by Thomson, the dealing being between him and another member of the Stock Exchange who knew him only in the transaction, and accordingly gave in payment for the shares a cheque payable to him or his order. This cheque was paid in by Thomson to the Clydesdale Bank. At the time when the cheque was paid in, his account with the Clydesdale Bank was overdrawn to an amount exceeding the amount so paid. Some few days afterwards he absconded, and application was then, or shortly afterwards, made by the appellants for the payment to them by the Clydesdale Bank of the sum of money which they had so received from him. After the date of the receipt of that cheque some small amounts were drawn upon his account by Thomson, but the amount so drawn was greatly less than the sum paid to his account in the manner described above. The question was whether, under these circumstances, the appellants were entitled to follow this sum of money and to require its payment to them by the Clydesdale Bank, or whether the Clydesdale Bank were entitled to retain it in discharge *pro tanto* of the debt which was due from Thomson.

“It cannot, I think,” said Lord Herschell, “be questioned that under ordinary circumstances a person, be he banker or other, who takes money from his debtor in discharge of a debt is not bound to inquire into the manner in which the person so paying the debt acquired the money with which he pays it. However that money may have been acquired by the person making the payment, the person taking that payment is entitled to retain it in discharge of the debt which is due to him. But it is said that, in the present

case, the bankers took with notice that the sum which they received was a sum of money not belonging to their debtor personally, but which he held or had received for other persons, and that, having had this knowledge or notice, they are not entitled to retain it in discharge of Mr. Thomson's debt. My Lords, I cannot assent to the proposition that, even if a person receiving money knows that such money has been received by the person paying it to him on account of other persons, that of itself is sufficient to prevent the payment being a good payment and properly discharging the debt due to the person who receives the money. No doubt if the person receiving the money has reason to believe that the payment is being made in fraud of a third person, and that the person making the payment is handing over in discharge of his debt money which he has no right to hand over, then the person taking such payment would not be entitled to retain the money, upon ordinary principles which I need not dwell upon. But, in the present case, there appears to me to be an absolute absence of any evidence of that kind." His Lordship then dealt with a point upon which stress had been laid in the argument, viz., that, in the bank books, Thomson was described as a stockbroker. "It is obvious that the case of the appellants wholly fails unless they bring home to the respondents much more than has been attempted here, namely, a knowledge that, in the particular case, the person was not justified in paying over the particular amount. Of course, if they prove that there was such knowledge on the part of the bankers, the bankers could not retain it. It seems to me that, if because an account is opened with bankers by a stockbroker they are bound to enquire into the source from which he receives any money which he pays in, it would be wholly impossible that business could be carried on, and I know of no principle or authority which establishes such a proposition."

It was accordingly held that the bank was entitled to retain the money in discharge *pro tanto* of the debt due to them from the broker.

Solicitor's Accounts.—Where a solicitor keeps two accounts with a banker, one under the head "office account," and another under

the head "private account," this does not amount to notice to the banker that moneys standing to the former are trust moneys, or even put the banker upon enquiry. Accordingly, if the latter account is overdrawn at the time when the accounts are closed, the banker is justified in setting-off a credit balance upon the other, although in fact moneys of clients have been paid in to it (*s*).

Notice Subsequent to Credit given by Banker.—A solicitor in the country received from a client a sum of money to be paid into the Court of Chancery on the client's account. The solicitor obtained a bill for the sum from a country banker, and remitted it to his bankers in London without stating the reason for which the amount had been paid to him. At the time he was indebted to his bankers in 450*l.*, for which they held securities, and as to which they kept an account separate from his general account. A few weeks after he died, and some days later the bill became due and was paid, the bankers carrying the amount to his general account. The bankers for some time after they had received notice from the client of the circumstances under which the amount of the bill had been paid to the solicitor continued to keep the accounts separate, but ultimately they deducted the 450*l.* from the proceeds of the bill and paid the balance to his executrix. It was held that as there was no agreement binding the bankers to keep separate accounts as to the 450*l.* and the amount of the bill, and as they had no notice till after the amount was received of the purpose for which it was intended to be applied, the client was not entitled to recover from them any part of the proceeds of the bill (*t*).

Notice of Breach of Trust.

A banker will not be justified in honouring a cheque or making any particular application of a balance when he knows that, by doing so, he will be participating in a breach of trust.

(*s*) *T. & H. Greenwood Teale v. William Williams, Brown & Co.* (1894), 11 T. L. R. 56.

(*t*) *Grigg v. Cocks* (1831), 4 Sim. 438.

See also *Union Bank of Australia v. Murray-Aynsley*, cited p. 154, *supra*; and *T. & H. Greenwood Teale v. William Williams, Brown & Co.*, cited *supra*, note (*s*).

In dealing with this branch of the subject, it will be convenient to distinguish two classes of cases.

I. Repayment of Overdraft.—Where it is proposed by the customer or the banker himself to apply a balance standing to the credit of the customer on a trust account or other trust moneys in discharge or reduction of a debt due from the customer upon his private account, the banker, *ex hypothesi*, knows the intended application of the trust moneys. By the very nature of the transaction his attention is directed to its true bearings. Accordingly, subject to what has been said about the time of the receipt of the notice of the trust, the banker may readily be held to have known that the transaction was a breach of trust. This appears from several of the cases which have been already cited.

But, although the banker knows that the moneys with which the customer repays an overdraft on his private account are derived from the fund of a third party, it does not necessarily follow that he knows of a misapplication. The circumstances of the case may be consistent with a right on the part of the customer to make the transfer or application in question.

In *Bank of New South Wales v. Goulburn Valley Butter Company Proprietary* (u) the respondents sued to recover from the appellants, their bankers, moneys which, standing to the credit of their account, had been transferred by cheques of the managing director to the credit of his own overdrawn private account with the same bankers.

In delivering the judgment of the Judicial Committee of the Privy Council in favour of the bank, Lord Davey said: "The question . . . is narrowed to this: whether there was any duty on the part of the bank or its manager to enquire into the state of the account between Ballantyne and the company. There is no evidence that Earle" (the bank manager) "knew that the company was not indebted to Ballantyne, or that the latter was not justified in filling up the cheques for the amounts they bear, and Earle states in his evidence that his belief was that any transfer Ballantyne made was simply transferring money that the company

(u) [1902] A. C. 543.

was owing to him. The course of business as described to Earle would necessarily result in cross-accounts between Ballantyne and the company, and probably in the latter becoming indebted to Ballantyne, and, indeed, there would be no objection in the company making advances to Ballantyne to enable him to meet his engagements for butter on their account. The law is well settled that in the absence of notice of fraud or irregularity a banker is bound to honour his customer's cheque (*Gray v. Johnston (v)* ; *Thomson v. Clydesdale Bank (w)*), and is entitled to set off what is due to a customer on one account against what is due from him on another account, although the moneys due to him may in fact belong to other persons: *Union Bank of Australia v. Murray-Aynsley (x)*. On the other hand, a banker is not justified of his own motion in transferring a balance from what he knows to be a trust account of his customer to the same customer's private account: *Ex parte Kingston, In re Gross (y)*. Their Lordships are of opinion that Earle was not bound to enquire into the state of the account between the parties. He had no materials to enable him to do so, and it is difficult to suggest anyone of whom he could have made enquiry other than Ballantyne himself. Their Lordships, therefore, hold that the bank is not affected with notice of any irregularity on Ballantyne's part."

In *Coleman v. Bucks and Oxon Union Bank (z)* the Chesham branch of the defendant bank were advised by the London and Westminster Bank, the London agents of the defendant bank, of the receipt of a sum of 1,411*l.* 2*s.* 2*d.* by an advice note, which was as follows:—

On whose account.	By whom paid.	—
James Gurney Trust.....	Parker & Wilkins, High Wycombe ..	£ s. d. 1,411 2 2

(v) (1868), L. R. 3 H. L. 1, cited at p. 161, *infra*.

(w) [1893] A. C. 282, cited at p. 154, *supra*.

(x) [1898] A. C. 693, cited at p. 154, *supra*.

(y) (1871) 6 Ch. 632, cited at p. 152, *supra*.

(z) [1897] 2 Ch. 243.

James Gurney had a current account, but no trust account, with the defendant bank. The manager at the Chesham branch accordingly placed the credit to his current account, and advised him of the credit on one of the bank's printed forms as follows :—

“We beg to advise you as understated, to your credit, viz., Parker and Wilkins, 1,411*l.* 2*s.* 2*d.*, which we have duly placed to your account.”

Gurney knew it was trust money, but gave no instructions to the bank, and continued to draw on his account as usual. At the time the trust money was so credited, his account was overdrawn on securities deposited with the bankers, and the effect of so crediting him was to largely reduce his overdraft temporarily. Gurney, however, was in good credit, and the bankers had no intention of benefitting themselves and no suspicion that Gurney contemplated a breach of trust, and they continued to allow him a further and extended overdraft on further securities deposited with them until his bankruptcy some time afterwards. Under these circumstances it was held that the bank was not liable to make good to the beneficiaries of Gurney the trust money that had been so lost.

“If,” said Mr. Justice Byrne, “bankers have the slightest knowledge or reasonable suspicion that the money is being applied in breach of a trust, and if they are going to derive a benefit from the transfer, and intend and design that they should derive a benefit from it, then I think the bankers would not be entitled to honour the cheque drawn upon the trust account without some further enquiry into the matter. But the present case is not that case at all.”

II. Payments to Third Parties.—Where a customer, who is a trustee, draws a cheque upon a trust account in favour of a third party, the banker will only have his attention drawn to the object or purpose of the payment under exceptional circumstances. He is under no duty to enquire as to the purpose for which a cheque is drawn (*a*), and as his customer is unlikely, under ordinary circumstances, to voluntarily explain that he is about to misapply trust

(*a*) See the cases cited on pp. 161—163, *infra*, and Lord Blackburn's observations in *Cunliffe Brooks & Co. v. Blackburn Benefit Society* (1884), 9 A. C. 857, at p. 864.

funds, it will obviously be very seldom that the banker will have notice of the breach intended.

In *Gray v. Johnston* (b) R. G. & Co., bankers, had acted as such to T. J., who carried on business with his son-in-law under the style of J. & M. His accounts with them were kept in his own name alone and were unsettled at his death. He left a will bequeathing all his property to the use of his wife for life, and after her death for division among their children as she might think fit. Part of the property consisted of life policies which were put into the hands of the bankers together with the probate of T. J.'s will, and they received the amount of the policies, made up their accounts, and after deducting their own unsettled claims, declared a certain sum to remain due from themselves to the executrix. She continued her husband's business with his late partner under the style of J. & M., and a new account was opened with the bankers in the name of the new firm, and she, as executrix, drew a cheque for the amount stated to be due to her, and paid it in to the bankers to be credited to the firm of J. & M., and it was so credited and paid out, with other money, on account of cheques drawn by the new firm. It was held that these circumstances were not in themselves sufficient to show that a breach of trust had been committed and that the bankers knew of the intention to commit it, so as to render them liable (in a suit by the children of the testator) to replace the money.

"In order," said Lord Chancellor Cairns, "to hold a banker justified in refusing to pay a demand of his customer, the customer being an executor and drawing a cheque as an executor, there must in the first place be some misapplication, some breach of trust intended by the executor, and there must in the second place . . . be proof that the bankers are privy to the intent to make this misapplication of the trust funds If it be shown that any personal benefit to the bankers themselves is designed or stipulated for, that circumstance, above all others, will most readily establish the fact that the bankers are in privity with the breach of trust which is about to be committed."

(b) (1868), 3 E. & I. A. 1.

Lord Westbury appears to have been inclined to allow greater freedom to the banker in honouring his customer's drafts, as he said: "Supposing, therefore, that the banker becomes incidentally aware that the customer, being in a fiduciary or a representative capacity, meditates a breach of trust, and draws a cheque for that purpose, the banker not being interested in the transaction has no right to refuse the payment of the cheque, for if he did so he would be making himself a party to an enquiry as between his customer and third persons. He would be setting up a supposed *jus tertii* as a reason why he should not perform his own distinct obligation to his customer."

Lord Colonsay, the only other lord present, had nothing to add to what had been stated by Lord Cairns and Lord Westbury, and said that he entirely agreed in the principles laid down.

It is submitted that Lord Westbury's statement of the law is inaccurate. As above pointed out, it is unlikely that in practice notice of a breach of trust would be brought home to a banker in a case where he was not personally interested in the transaction. But in point of law the personal interest is immaterial, and actual notice of, and participation in, the breach of trust is a sufficient ground of liability (c).

In *Stewart v. Lee* (d) C. drew a cheque payable to A. and B., the assignees of C., or bearer, and wrote the name of their banker across it. B., who had a private account with the banker, paid the cheque into that account. It was held that the bankers were justified in applying it thereto; the fact of the drawer having crossed the cheque with the name of the bankers of the payees not being, according to the custom of trade, information to the bankers that the money was that of the payees.

When accounts are kept at a banker's by a firm, each partner having a right to draw cheques, and also by the individual partners of the firm, it is not the duty of the banker to enquire into the propriety of any transfer of funds which may be made from and to the different accounts. Upon the death of one partner in a firm

(c) See the cases cited on pp. 151—153, *supra*.

(d) (1828), Moo. & M. 158.

having an account at a banker's, the surviving partner has a right to draw cheques upon the partnership account. Such cheques the banker will be justified in honouring unless he has express notice that some breach of duty is taking place (*e*).

In connection with the subject of cheques drawn in breach of trust, reference may be made to Part III. Chap. 9, and as to the right of following trust moneys paid in to the account, to the next chapter of this Part.

Use of Banks by Executors and Trustees.

Current Accounts.—If a current account is necessary for the purposes of the administration of a trust, the trustees will, of course, be justified in keeping it.

But an executor who allows his testator's estate to become insolvent by keeping an account at a bank at compound interest, will not be allowed the accumulated interest on passing his accounts (*f*).

Receipt and Payment of Moneys.—Persons in a fiduciary capacity will be justified in employing a banker to make or receive a payment where this is a usual and prudent course to adopt.

In *In re Flower, M.P., and Metropolitan Board of Works* (*g*) trustees of real estate had sold parts of it to the Metropolitan Board of Works, and they sent in a requisition that the vendors should attend personally to receive the purchase-moneys or direct the moneys to be paid to their joint account at a bank. One or more of the trustees resided in the country. On summonses taken out under the Vendor and Purchaser Act, 1874, by the Board, it was held that the requisition must be complied with by the trustees.

Assurance Moneys.—The Trustee Act, 1893 (56 & 57 Vict. c. 52), provides—

17.—(2.) A trustee may appoint a banker or solicitor to be his agent to receive and give a discharge for any money payable to the trustee under or by virtue of a policy of assurance, by per-

(*e*) *Backhouse v. Charlton* (1878), 8 Ch. D. 444.

(*f*) *Bate v. Robins* (1863), 32 Beav. 73.

(*g*) (1884), 27 Ch. D. 592.

mitting the banker or solicitor to have the custody of and to produce the policy of assurance with a receipt signed by the trustee, and a trustee shall not be chargeable with a breach of trust by reason only of his having made or concurred in making any such appointment.

(3.) Nothing in this section shall exempt a trustee from any liability which he would have incurred if this Act had not been passed, in case he permits any such money, valuable consideration, or property to remain in the hands or under the control of the banker or solicitor for a period longer than is reasonably necessary to enable the banker or solicitor (as the case may be) to pay or transfer the same to the trustee.

(5.) Nothing in this section shall authorize a trustee to do anything which he is in express terms forbidden to do, or to omit anything which he is in express terms directed to do, by the instrument creating the trust.

Deposits of Moneys with Banker.—An executor or trustee depositing moneys of his estate at a bank in good repute at the time for a short period, pending the opportunity of favourably investing them, will not be liable to the beneficiaries if a loss is sustained through the failure of the bank (*h*).

But a person in a fiduciary position is not justified in depositing money with a bank as an investment, unless such an investment is authorized by the will or trust-deed. If he does so, and loss ensues in consequence, he will be liable, notwithstanding that the instrument creating the trust contains a clause indemnifying the trustees against losses by a banker of moneys deposited with him for safe custody (*i*).

Nor will trustees who have deposited money with a bank pending an investment be justified in leaving it there for any considerable period. In *Cann v. Cann* (*k*) Mr. Justice Kay held

(*h*) *Fenwick v. Clarke* (1862), 31 L. J. Ch. 728; 10 W. R. 636; 6 L. T. N. S. 593; *Adams v. Claxton* (1801), 6 Ves. 226; *Johnson v. Newton* (1853), 11 Hare, 160; *Wilks v. Groome* (1856), 3 Drew. 584.

(*i*) *Rehden v. Wesley* (1861), 29 Beav. 213. See also *Perpetual Executors and*

Trustees' Association of Australia v. Swan, [1898] A. C. 763, where it was held that a trustee company is not authorized by the law of Victoria to invest trust moneys on deposit at interest with banks.

(*k*) (1884), 51 L. T. 770; 33 W. R. 40.

that fourteen months was too long; that if, after six months, the trustees could not get a mortgage, they ought to have invested the money in Consols; that from the moment they left it too long on deposit, they became responsible for the consequences of their default, and that they were therefore liable for the sum lost to the estate through the failure of the bank, notwithstanding that the will creating the trust contained a provision that no trustee should be answerable for any banker, broker, or other person in whose hands any moneys might be deposited for safe custody or otherwise (*l*).

In *Challen v. Shippam* (*m*) a trustee depositing a trust fund with his bankers, accompanied by an order in writing to invest the money in Consols, was held answerable for the omission of the bankers to make the investment, when he had made no subsequent enquiry respecting it, until more than five months afterwards when the bankers became bankrupt.

The deposit of trust securities with bankers for safe custody is dealt with in Part VII. Chap. 2.

(*l*) Cf. *Fletcher v. Walker* (1818), 3 Mad. 73; *Astbury v. Beasley* (1869), 17 W. R. 638; *Matthews v. Brise* (1843), 6 Beav. 239; 12 L. J. N. S. Ch. 363; affirmed 15 L. J. N. S. Ch. 39; 10 Jur.

105, where exchequer bills were left with a broker, and the trustee was held liable for the broker's misapplication of them.

(*m*) (1845), 4 Hare, 555.

CHAPTER IV.

ADJUSTMENT OF ITEMS.

INASMUCH as many distinct payments are made by both parties to the account, questions sometimes arise as to the proper method of appropriating particular items. In considering this subject, it will be convenient to advert briefly to the general rules as to appropriation of payments made by debtors, and then to deal with the appropriation which will be made by law in the case of a current account in the absence of any actual appropriation by the parties themselves.

Appropriation of Payments.

General Rules.—"The party who pays money has the right to apply that payment as he thinks fit. If there are several debts due from him, he has a right to say to which of those debts the payment shall be applied" (*a*). An appropriation by the debtor need not be express. "If a man sends money to another and that other receives it, the first point is, what was the intention with which it was sent; and if that cannot be ascertained by direct proof, it must be got at by circumstantial evidence; and, whatever is the intention, that must prevail, unless only the other elects to return the money" (*b*).

If the debtor does not make any appropriation at the time of payment, the party receiving it may make the appropriation (*c*).

(*a*) Per Bayley, J., in *Simson v. Ingham*, cited at p. 170, *infra*. 1 Jur. N. S. 946.

(*b*) Per Knight-Bruce, L. J., in *Nash v. Hodgson* (1855), 25 L. J. Ch. 186, at pp. 188-9; 6 De G. M. & G. 474;

(*c*) *Manning v. Westerne* (1707), 2 Vern. 606; per Tindal, C. J., in *Mills v. Fowkes* (1839), 5 Bing. N. C. 455, at p. 459.

He may exercise this right up to the last moment, by action or otherwise (*d*). The application of the money is governed by the intention of the creditor, expressed, implied or presumed (*d*).

“If neither make any appropriation the law appropriates the payment to the earliest debt” (*e*), in the absence of some reason to the contrary based upon considerations of equity (*f*).

Where a person has two demands upon another, one arising out of a lawful contract, the other out of a contract forbidden by law, and the debtor makes a payment which is not specifically appropriated by either party at the time of payment, the law will appropriate it to the debt recognised by law (*g*).

Where a debtor owes his creditors some debts more than six years old and others from a period within six years, and pays a sum without appropriating it to any particular debt, such payment is not a payment on account, to take out of the Statute of Limitations the debts due longer than six years; but the creditor may at any time apply such payment to the debts due longer than six years (*h*).

Items of Current Account.

In the case of a banking account the simple rule, which is generally applicable, was expounded by Sir William Grant, M. R., in *Devaynes v. Noble, Clayton's Case* (*i*), as follows:—

“This is the case of a banking account, where all the sums paid in form one blended fund, the parts of which have no longer any distinct existence. Neither banker nor customer ever thinks of saying, ‘This draft is to be placed to the account of the 500*l.* paid in on Monday, and this other to the account of the 500*l.* paid in on Tuesday.’ There is a fund of 1,800*l.* to draw upon, and that

(*d*) *Cory Brothers & Co. v. Owners of Turkish S.S. Mecca, The Mecca*, [1897] A. C. 286.

(*e*) Per Tindal, C. J., in *Mills v. Fowkes* (1839), 5 Bing. N. C. 455, at p. 461.

(*f*) Cf. *Copland v. Toulmin* (1839), 7 Cl. & F. 349; *Favenc v. Bennett* (1809), 11 East, 36.

(*g*) *Wright v. Laing* (1824), 3 B. & C. 165.

(*h*) *Mills v. Fowkes* (1839), 5 Bing. N. C. 455. See *Friend v. Young*, [1897] 2 Ch. 421; *Smith v. Betty*, [1903] 2 K. B. 317; 19 T. L. R. 602.

(*i*) (1816), 1 Mer. 572, at pp. 608—610.

is enough. In such a case, there is no room for any other appropriation than that which arises from the order in which the receipts and payments take place, and are carried into the account. Presumably, it is the sum first paid in that is first drawn out. It is the first item on the debit side of the account that is discharged, or reduced, by the first item on the credit side. The appropriation is made by the very act of setting the two items against each other. Upon that principle all accounts current are settled, and particularly cash accounts. When there has been a continuation of dealings, in what way can it be ascertained whether the specific balance due on a given day has, or has not, been discharged, but by examining whether payments to the amount of that balance appear by the account to have been made? You are not to take the account backwards, and strike the balance at the head, instead of the foot, of it. A man's banker breaks, owing him, on the whole account, a balance of 1,000*l*. It would surprise one to hear the customer say, 'I have been fortunate enough to draw out all that I paid in during the last four years; but there is 1,000*l*. which I paid in five years ago that I hold myself never to have drawn out; and, therefore, if I can find anybody who was answerable for the debts of the banking-house, such as they stood five years ago, I have a right to say that it is that specific sum which is still due to me, and not the 1,000*l*. that I paid in last week.' And later on in his judgment his Honour said: "If appropriation be required, here is appropriation in the only way that the nature of the thing admits. Here are payments so placed in opposition to debts, that on the ordinary principles on which accounts are settled this debt is extinguished. If the usual course of dealing was, for any reason, to be inverted, it was surely incumbent on the creditor to signify that such was his intention. He should either have said to the bankers, 'Leave this balance altogether out of the running account between us,' or, 'Always enter your payments as made on the credit of your latest receipts, so as that the oldest balance may be the last paid.' Instead of this, he receives the account drawn out as one unbroken running account. He makes no objection to it,—and the report states that the silence of the

customer after the receipt of his banking account is regarded as an admission of its being correct. Both debtor and creditor must, therefore, be considered as having concurred in the appropriation " (k).

Where there was a running cash and bill account between a bankrupt and a banking company, who were under considerable advances to him, but part of these advances arose out of transactions which, under the then state of the law, were illegal (being the issue of notes by a banking company consisting of more than six partners), and the bankrupt from time to time deposited bills and made payments without any specific appropriation or any settled account between him and the bankers, it was held that the payments must be appropriated in reduction of the earlier items of the account, and of the legal and not the illegal part of the demand (l).

Where an account is continued after a dissolution of partnership in the same mode as before by the succeeding firm, the rule in *Clayton's Case* will apply (m).

Thus, in *Brooke v. Enderby* (n), the plaintiff carried on dealings in one general and unbroken account with A., one of the defendants, as his banker and army agent, from a period before 1807 up to 1819, when A. became bankrupt, and a balance was struck for the first time since 1816. In 1807 the defendant B. became a partner with A., and continued so till 1817, but the partnership was secret, and unknown to the plaintiff till A.'s bankruptcy, B. never interfering (to the knowledge of the plaintiff) in the business carried on by A. At the expiration of the partnership in 1817, a balance was due from the defendants to the plaintiff.

(k) See this case discussed by Lord Macnaghten in *Cory Brothers & Co. v. Owners of Turkish S.S. Mecca*, [1897] A. C. 286, at pp. 293—296; and cf. *Bodenham v. Purchas*, cited at p. 669, *infra*.—The rule will apply where there is in fact a current or blended account, although the relation of banker and customer does not exist; as, *e.g.*, where one party has habitually received moneys from another, and from time to time made

payments on his account as requested: *Egg v. Craig* (1903), 89 L. T. 41. See also *In re Hamilton, Ex parte Smith* (1877), 25 W. R. 760; and *Hooper v. Keay*, cited on the next page.

(l) *Ex parte Randleson* (1833), 2 Dea. & Ch. 534.

(m) *Laing v. Campbell* (1865), 36 Beav. 3. Cf. *Snead v. Williams* (1863), 9 L. T. N. S. 115.

(n) (1820), 2 B. & B. 70.

Between the expiration of the partnership and A.'s bankruptcy, A. paid to the plaintiff, and also received from him, several sums. In an action against the defendants for the balance due from them at the expiration of the partnership (A. having pleaded his bankruptcy and certificate), it was held that B. might consider the sums paid by A. to the plaintiff after the expiration of the partnership as paid in reduction of the balance due at the expiration of the partnership, and might take credit for them without giving credit for any sums received after the expiration of the partnership by A. on account of the plaintiff.

In *Hooper v. Keay* (o) the plaintiffs had supplied goods to K. and D., who were in partnership, and they had given the plaintiffs their acceptance for 132*l.*, the amount. Before the bill was due K. and D. dissolved partnership, and gave notice to the plaintiffs, with the intimation that K. would carry on the business, and would receive and pay the accounts due to and from the old firm. The plaintiffs continued to supply K. with goods, and he gave them his acceptance for the amount, and also paid them several sums on account, but without any specific appropriation. After some months the plaintiffs sent in their account to K., beginning on the debit side with the acceptance for 132*l.*, and, after giving him credit for the sums paid, showing a balance against K. of 92*l.* After this K. paid the plaintiffs two other sums, which, with the sums already paid, amounted to more than 132*l.* The plaintiffs having sued K. and D. on their acceptance for 132*l.*, D. pleaded payment. It was held that, the plaintiffs having sent in the statement to K. treating the whole as one account, the subsequent payments must be appropriated to the earlier items of the account; and consequently that the plea was proved.

But it will be otherwise where distinct accounts are kept and the new firm, as creditors, have appropriated a payment to the new account. This is illustrated by *Simson v. Ingham* (p). There a bond had been given by country bankers to the several persons constituting the firm of a London banking-house, conditioned for remitting money to provide for bills, and for the repayment of

(o) (1875), 1 Q. B. D. 178.

(p) (1823), 2 B. & C. 65.

such sums as the London bankers might advance on account of persons constituting the firm of the country banking-house, or any of them, associated or not with other persons. One of the partners in the country bank died, a considerable balance being then due to the London bankers. It was the course of business between the two houses for the London bankers to send in to the country bankers monthly accounts of receipts and payments. In the month following the death of the partner, the London bankers received sums in payment more than sufficient to discharge the balance then due; but during the same time they advanced money on account of the country bankers to an equal amount. In the first instance the London bankers entered in their books all the receipts and payments made after the death of the partner to the account of the old firm, but they did not transmit any account to the country bankers until two months after the death, and then they transmitted two distinct accounts: one the account of the old firm, made up to the day of the death of the partner; and another, a new account containing all payments and receipts subsequent to that time.

In giving judgment in the Court of King's Bench, Mr. Justice Bayley said: "Where one of several partners dies and the partnership is in debt, and the surviving partners continue their dealings with a particular creditor, and the latter joins the transactions of the old and the new firm in one entire account, then the payments made from time to time by the surviving partners must be applied to the old debt. In that case, it is to be presumed that all the parties have consented that it should be considered as one entire account, and that the death of one of the partners has produced no alteration whatever. In this case the partner died in September, 1814. If, in the ordinary course of business, in October, 1814, a monthly account had been sent in, stating the transactions before and after the death of the partner as forming part of one entire account, and the balance as due from the survivors; in that case the creditor would have been precluded, and would have had no right to have said that the payments made subsequently to the death of the partner should be applied to any but the old account.

In fact, the bankers in London did not send in any account after the death of the partner until November, and then they sent in two distinct accounts: one made up to the day of the death of the partner, and the other commencing from that period. At that time, therefore, the bankers in London expressed their dissent from making the whole one entire account. It has been insisted that, at that period of time, they had no right so to do, because they were precluded by the entries which they had already made in their own books in the intermediate space of time. If, indeed, a book had been kept for the common use of both parties as a pass-book, and that had been communicated to the opposite party, then the party making such entries would have been precluded from altering that account; but entries made by a man in books which he keeps for his own private purposes, are not conclusive on him until he has made a communication on the subject of those entries to the opposite party. Until that time he continues to have the option of applying the several payments as he thinks fit. For these reasons I am of opinion that the plaintiffs were not precluded from applying the payments to the new account, and therefore that this award is right" (q).

"As a creditor has no right to take the account subsisting between him and his debtor backwards, so as to make himself appear a creditor in respect of the earlier rather than of the later items of the account, so, on the other hand, a debtor, after making general payments in respect of an entire account, is not at liberty to have those payments applied in liquidation of the subsequent rather than of the earlier items" (r).

Thus, in *Beale v. Caddick* (s), H. and C., partners, were indebted to R., their banker, to the amount of 979/. In 1851 R., with the concurrence of H., transferred his business to the M. bank, including the account in question. The account of H. and C. with the M. bank commenced with this item of 979/. and continued open for

(q) See also *Brown, Janson & Co. v. Cama & Co.* (1890), 6 T. L. R. 250, where, the banker having shown an intention to the contrary, the rule was not applied; and cf. *Manning v. Westerne*

(1707), 2 Vern. 606.

(r) Lindley on Partnership, 6th ed. p. 238.

(s) (1857), 2 H. & N. 326.

a considerable time, during which H. paid in moneys to an amount exceeding the sum of 979/. The pass-book was regularly sent to H. The deed transferring the business from R. to the M. bank contained a provision that at the expiration of twelve months, as to such accounts as should not be taken to by the M. bank, the M. bank should, during a period not exceeding ten years, either accept or compel payment, or permit the same to remain due, and should be possessed of all moneys paid in discharge of such accounts in trust for R. In 1852 the M. bank gave notice to R. that they would not take to this amount. Subsequently the M. bank sued H. and C. to recover the balance due.

It was held that H. had power to bind his partner by assenting to the transfer of the debt on the account; and that the debt of 979/. was extinguished by the payments subsequently made by H. to the credit of the partnership account, and the assent to the appropriation to be inferred from H. not objecting to the pass-book, and that after such extinguishment, as between the M. bank and the partnership, this account could not be treated as an existing debt remaining due to R.

“When Hartland received the pass-book,” said Martin, B., “and saw the money from time to time paid by him appropriated or entered in that book, he had a right to appropriate the money as against the first item, and, except with his consent, that money could not afterwards be appropriated otherwise.”

Company's Account.—In *In re Devonport and South Devon Steam Flour Mill Co., Captain Bateman's Case* (t), it was held that the rule in *Clayton's Case* applies to dealings between a company and its bankers, so that a former shareholder who has transferred his shares is exonerated from contributing to the company's debt to its bankers, if, before the winding-up, sufficient money has been paid to the bank to cancel what was due to it when such shareholder ceased to be a member.

Ignorance of the Rule.—Ignorance on the part of those con-

(t) (1873), 42 L. J. Ch. 577.

cerned of the rule in *Clayton's Case* will not prevent its operation (*u*).

Items Arising out of Fraud.—The rule will not apply in respect of such items as against a party who has been defrauded.

In *Lacey v. Hill* (*v*) H., a banker, took into partnership K., a country gentleman unacquainted with banking, who was not bound to bring in any capital or to attend to the business. K. did not acquaint himself with the accounts, though he occasionally came to the bank. H. from time to time fraudulently drew large sums out of the bank, and employed them in losing speculations on the Stock Exchange, concealing the overdrawings by means of fictitious entries in the books of the bank. K. never drew out anything. On the death of H. the bank was found utterly insolvent, and K. was adjudicated bankrupt. A decree was made for the administration of the estate of H., under which the trustee in bankruptcy of K. claimed to prove for what was due from H. for moneys thus fraudulently drawn out. It was held that he was entitled to prove, and that the rule in *Clayton's Case* could not be applied to fraudulent overdrawings.

Lord Justice James, in giving judgment, said: "We are unanimously of opinion that we are bound by the law as laid down in *Ex parte Harris* (*w*) The rule there laid down by Lord Eldon . . . is, that if a partner fraudulently takes money out of the partnership assets for his own private purposes, a proof can be made for it against his separate estate. As regards the argument that the separate estate has not been enlarged, it is enlarged if the joint estate is employed in paying sums which the separate estate ought to have paid. If the sums which became due to the stock-brokers had not been paid out of the joint estate, they could have been proved against the separate estate, so no wrong is done to the creditors. If you can show that any of the overdrawings were simple overdrawings, not tainted by fraud, the case will be different as to them."

(*u*) *Merriman v. Ward* (1860), 1 J. & H. 371.

(*v*) (1876), 4 Ch. D. 537; affirmed

sub nom. Read v. Bailey (1877), 3 A. C. 94.

(*w*) (1813), 2 V. & B. 210.

It was then argued that the principle of *Clayton's Case* applied, but the Lord Justice said: "I am of opinion that *Clayton's Case* cannot be applied to fraudulent items. If, indeed, a partner fraudulently draws out 10,000*l.*, and then pays in a sum of 10,000*l.*, specifically appropriating it with his partner's knowledge to meet the sum drawn out, there is an end of it; but if he goes on manipulating the accounts, and concealing the fraud from his partner, the fraud must be made good when it is discovered. Sums of money which he paid in and entered in the books must be attributed in the first place to moneys drawn out, which were also entered in the books." Lord Justice Mellish added: "Suppose a partner fraudulently draws out 20,000*l.*, and then draws out openly 10,000*l.* more, which he enters in the books, so that it is a simple overdrawing without fraud. He then pays in 30,000*l.* It is contended that he has repaid the 20,000*l.*, and that unless he makes further fraudulent overdrawings, there is no right of proof against his separate estate. But suppose he openly draws 30,000*l.* out again, the firm is cheated of the 20,000*l.* just as much as if he had never paid in the 30,000*l.* I am of opinion, therefore, that *Clayton's Case* cannot be applied to fraudulent debts of this nature."

Form of Account.—The rule does not apply to a case where there is no account current between the parties, nor where, from an account rendered or other circumstances, it appears that the creditor intended, not to make any appropriation, but to reserve the right (*x*).

Trust Moneys.

In the case of trust moneys an important distinction is to be observed.

Where a customer who holds money as a trustee, or in a fiduciary capacity, pays it to his account at his bankers, and mixes it with his own money, and afterwards draws out sums by cheques in the ordinary manner, the customer must be taken to

(*x*) *Cory Brothers & Co. v. Owners of Turkish SS. Mecca*, see p. 169, note (*k*), *supra*.

have drawn out his own money in preference to the trust money. In this case the rule in *Clayton's Case*, attributing the first drawings out to the first payments in, does not apply (x).

In the course of his judgment in *In re Hallett's Estate, Knatchbull v. Hallett* (y), Sir George Jessel, M. R., said: "The simplest case put is the mingling of trust moneys in a bag with money of the trustee's own. Suppose he has a hundred sovereigns in a bag, and he adds to them another hundred sovereigns of his own, so that they are commingled in such a way that they cannot be distinguished, and the next day he draws out for his own purposes 100*l.*, is it tolerable for anybody to allege that what he drew out was the first 100*l.*, the trust money, and that he misappropriated it, and left his own 100*l.* in the bag? It is obvious he must have taken away that which he had a right to take away, his own 100*l.* What difference does it make if, instead of being in a bag, he deposits it with his banker, and then pays in other money of his own, and draws out some money for his own purposes? Could he say that he had actually drawn out anything but his own money? His money was there, and he had a right to draw it out, and why should the natural act of simply drawing out the money be attributed to anything except to his ownership of money which was at his bankers? It is said, no doubt, that according to the modern theory of banking, the deposit banker is a debtor for the money. So he is, and not a trustee in the strict sense of the word. At the same time, one must recollect that the position of a deposit banker is different from that of an ordinary debtor. Still, he is for some purposes a debtor, and it is said if a debt of this kind is paid by a banker, although the total balance is the amount owing by the banker, yet, considering the repayments and the sums paid in by the depositor, you attribute the first sum drawn out to the first sum paid in. That was a rule first established by Sir William Grant in *Clayton's Case*; a very convenient rule, and I have

(x) *In re Hallett's Estate, Knatchbull v. Hallett* (1879), 13 Ch. D. 696, not following upon this point *Pennell v. Deffell* (1853), 4 De G. M. & G. 372; and overruling *Brown v. Adams* (1869), 4 Ch. 764; 39 L. J. Ch. 67. See *In re Oatway, Hertslet v. Oatway*, [1903] 2 Ch. 356.
(y) At pp. 727, 728 of the report: see last note.

nothing to say against it unless there is evidence either of agreement to the contrary or of circumstances from which a contrary intention must be presumed, and then, of course, that which is a mere presumption of law gives way to those other considerations. Therefore, it does appear to me there is nothing in the world laid down by Sir William Grant in *Clayton's Case*, or in the numerous cases which follow it, which in the slightest degree affects the principle, which I consider to be clearly established" (z).

In *Birt v. Burt* (a) B., a solicitor, had been employed by the trustees for sale of an estate to receive the purchase-moneys and pay them in to the trustees' banking account. He received large sums, paid them in to his private account, and died insolvent. His banking account at his death showed a large credit, principally made up of specific sums which corresponded with receipts by him on account of sales of the trust estate. It was held that these specific sums could be followed by the trustees, and that there could not be a set-off allowed in respect of sums alleged to have been paid by B. on account of the trust estate.

In *Hancock v. Smith* (b) a judgment creditor of a stockbroker obtained a garnishee order on a balance at a bank standing to the credit of the broker. All moneys in the bank to the broker's credit were moneys received for clients. Since money of a client had been paid in drawings out in excess of the then balance had been made. And so in the case of another client. Except those two there was no client who claimed any part of the fund. It was held that, as no part of the moneys in the bank was the debtor's own, the judgment creditor had no right against the balance; and that, it being shown that the balance was equal to the sums remaining due from the broker to two clients in respect of moneys of theirs paid in to the account, and that there was no claim on behalf of any other client, the money belonged to them (c).

In *In re Oatway, Hertslet v. Oatway* (d), where a trustee had paid trust money in to his banking account, whereby it became mixed

(z) Cf. *Lacey v. Hill* (1876), 4 Ch. D. 537; affirmed *sub nom. Read v. Bailey* (1877), 3 A. C. 94.

(a) (1877), 36 L. T. 943.

(b) (1889), 41 Ch. D. 456.

(c) See also *In re W. Wreford, Carmichael v. Rudkin* (1897), 13 T. L. R. 153.

(d) [1903] 2 Ch. 356.

with his own money, and out of moneys drawn from the account had purchased an investment in his own name, but subsequently applied the balance to his own purposes, it was held that his representatives could not successfully maintain that the investment had been purchased out of the trustee's own money, and that what had been spent, and could no longer be traced and recovered, was the money belonging to the trust.

But, in order to follow trust money, there must be a specific fund capable of being identified into which the money has been converted (*e*). A settlement of account cannot be followed (*f*).

Moreover, the rule in *Clayton's Case* may apply against one *cestui que trust* in favour of other claimants whose equity is the same as his own.

In *In re Stenning, Wood v. Stenning* (*g*), a solicitor paid money which he had received for a client to his own banking account. From that time up to the death of the solicitor there was always to the credit of the account a balance exceeding the sum so paid in. But on many days during that period the credit balance was less than the amount of other clients' moneys which the solicitor had paid in subsequently to his payment of the money of the first client and had not withdrawn. It was held that the rule in *Clayton's Case* applied, and that the money of the first client must be taken to have been drawn out by the solicitor, and therefore not to have formed part of the balance to the credit of the account at the time of his death; and, consequently, that the first client was not entitled to be paid out of that balance specifically in priority to other creditors, the estate of the solicitor being insolvent (*h*).

Cases further illustrating the principles considered in this chapter will be found in various other parts of this work, particularly in Part VIII. Chap. 5 (*i*).

(*e*) *In re Hallett & Co., Ex parte Blane*, [1894] 2 Q. B. 237.

(*f*) Per Lord Esher, M. R., in the case referred to in the last note, at p. 244 of the report.

(*g*) [1895] 2 Ch. 433.

(*h*) Cf. *Mutton v. Peat*, [1900] 2 Ch. 79, cited in Part VIII. Chap. 5.

(*i*) See especially the following cases:—*London and County Bank v. Ratcliffe* (1881), 6 App. Cas. 722; 51 L. J. Ch. 28; 45 L. T. 322; 30 W. R. 109; *Blackburn Building Society v. Cunliffe, Brooks & Co.* (1882), 22 Ch. D. 61; 9 App. Cas. 857; *In re Sherry, London and County Banking Co. v. Terry* (1884), 25 Ch. D. 692.

CHAPTER V.

INTEREST.

INTEREST is only payable upon a loan by virtue of agreement or special custom or statute (*a*).

It may be charged—

1. Where there has been an express agreement to pay it.
2. On bills of exchange, promissory notes, and other mercantile instruments (*b*).
3. On a bond in a penal sum (*c*).
4. On mortgages (*d*).
5. By 3 & 4 Will. 4, c. 42, s. 28 :

Upon all debts or sums certain, payable at a certain time or otherwise, the jury on the trial of any issue, or on any inquisition of damages, may, if they shall think fit, allow interest to the creditor at a rate not exceeding the current rate of interest from the time when such debts or sums certain were payable, if such debts or sums be payable by virtue of some written instrument at a certain time, or, if payable otherwise, then from the time when demand of payment shall have been made in writing, so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the term of payment; provided that interest shall be payable in all cases in which it is now payable by law.

6. Where a contract to pay it may be implied from the mode of dealing between the parties (*e*), the usage of trade (*f*), or other circumstances (*g*).

(*a*) See *Edwards v. Vere* (1833), 5 B. & Ad. 282.

(*b*) *Cameron v. Smith* (1819), 2 B. & Ald. 305; *Keene v. Keene* (1857), 3 C.B. N. S. 144; Bills of Exchange Act, s. 57 (1) (*b*).

(*c*) *Farquhar v. Morris* (1797), 7 T. R. 124; *In re Dixon*, *Heynes v. Dixon*, [1900] 2 Ch. 561; *In re Drax*, *Savile v. Drax*, [1903] 1 Ch. 781.

(*d*) *Price v. G. W. Railway* (1847), 16 M. & W. 244; *Gordillo v. Weguelin* (1876), 5 Ch. D. 287.

(*e*) *Morgan v. Jones* (1853), 8 Exch. 620; *In re Gosman* (1881), 17 Ch. D. 771.

(*f*) *Ex parte Bishop*, *In re Fox*, *Walker & Co.* (1880), 15 Ch. D. 400.

(*g*) *Marshall v. Poole* (1810), 13 East,

Accordingly, a banker may charge, or become liable to pay to his customer, interest, not only where an express agreement to this effect has been entered into, but also where, in his previous course of dealing with that customer, interest has been charged against or allowed to him.

Thus, where in his course of dealing with a customer he has been in the habit of charging him with interest upon every advance of money, the customer will become legally liable to pay such interest (*h*).

So where the custom of a bank has been to make an allowance of interest at a certain rate to their customers, interest at that rate will be added on a judgment recovered against them for a balance due from them of money deposited by a customer (*i*).

On the other hand, where the defendant, at J.'s request, consented to transfer to the plaintiff's account money which the defendant had received for J., and for which it had been the course of dealing between the defendant and J. to allow interest, it was held that the plaintiffs could not recover interest on the amount (*k*).

A banker in charging interest to a customer who has overdrawn his account should compute it, not from the date, but from the payment of the customer's cheque (*l*).

A custom for a banker to charge his customer for an indefinite period with interest upon sums of money which he has been instructed to pay, although he has not paid them, owing to the fact of the bills in respect of which they were to have been paid not being presented, and although his customer has no knowledge of this, would, it seems, be unreasonable and invalid (*m*).

In the absence of any agreement or acquiescence, evidence of the

98; *Davis v. Smyth* (1841), 8 M. & W. 399.

(*h*) *Gwyn v. Godby* (1812), 4 Taunt. 346; *Mosse v. Salt* (1863), 32 L. J. Ch. 756; 32 Beav. 269.

(*i*) *Ikin v. Bradby* (1818), 5 Price, 536; *In re East of England Banking Co.* (1868), 4 Ch. 14. Cf. *Ex parte Riddell* (1842), 3 M. D. & D. 80, at pp. 91, 92; 12 L. J.

Bank. 19; 7 Jur. 21.

(*k*) *Fruhling v. Schroeder* (1835), 2 Bing. N. C. 77.

(*l*) *Goodbody v. Foster* (1831), Byles on Bills, 16th ed. pp. 26, 442.

(*m*) Per Baggallay, L. J., in *West of England and South Wales District Bank v. Evans* (1881), Journal of Institute of Bankers, Vol. II. p. 397.

custom of bankers is admissible for the purpose of determining the principle upon which an account ought to be taken (*n*).

A banker who improperly, or without title, retains moneys overpaid to him as a mortgagee is chargeable with interest thereon (*o*).

Compound Interest.

By virtue of contract, express or implied, or custom, compound interest may become payable by or to a banker (*p*).

In merchants' accounts, when an annual account is made out upon accounts current, and a balance struck comprising both principal and interest due up to a certain day, and that balance is carried to a new account bearing interest, compound interest is given in effect (*q*).

After an acquiescence in accounts furnished by bankers, annually or half-yearly, in which a rest has been made at the end of each year or half-year, the balance of principal and interest constituting the first item in the next account, an agreement that the balance of principal and interest shall bear interest will be presumed (*r*).

By virtue of a subsequent agreement compound interest may become payable on a mortgage debt (*s*).

So where a mortgage is made by way of collateral security for such balance as may eventually be due from a customer to his banker, it is no objection, to charging the land with such balance, that it has been partly composed of interest turned into principal by rests, and interest on that interest, according to the course of dealing between the two (*t*).

(*n*) *Mosse v. Salt* (1863), 32 L. J. Ch. 756; 32 Beav. 269. See also *Williamson v. Williamson* (1869), 7 Eq. 542. As to computation of interest as against a surety, see *Reddie v. Williamson* (1863), 1 Macph. 228; *Gilman v. Bank of Scotland* (1880), 7 Rettie (4th ser.), 734.

(*o*) *London Chartered Bank of Australia v. White* (1879), 4 A. C. 413.

(*p*) *Fergusson v. Fyffe*, cited at p. 182, *infra*; *National Bank of Australasia v. United Hand-in-Hand, &c. Co.* (1879), 4 A. C. 391, at p. 409.

(*q*) Per Lord Abinger, C. B., in *At-*

wood v. Taylor (1840), 1 M. & G. 279, at pp. 300-1. See also *Ex parte Champion* (1792), 3 Bro. C. C. 436, at p. 440.

(*r*) *Lord Clancarty v. Latouche* (1810), 1 Ball & B. 420; followed in *Rufford v. Bishop* (1829), 6 Russ. 346, and cited with approval by Stuart, V.-C., in *Thomas v. Cooper* (1854), 18 Jur. 688. The latter case would now be decided differently owing to the repeal of the usury laws. See also *Ex parte Bevan* (1803), 9 Ves. 223.

(*s*) *Blackburn v. Warwick* (1836), 2 Y. & C. Ex. 92; 6 L. J. N. S. Exch. Eq. 17.

(*t*) *Lord Clancarty v. Latouche* (1810),

But where a mortgage has been given by a customer to his banker for a fixed sum, and the customer at the same time has a current account, in ascertaining the amount due, the accounts in respect of the mortgage and of the current account must be taken separately. Compound interest cannot be charged in taking the former, but may be charged in taking the latter, if warranted by contract or the previous dealings of the parties (*u*).

After Account Closed.

The title to compound interest will cease when the account between the parties is closed, as, for instance, by the death or bankruptcy of either.

In *Fergusson v. Fyffe* (*v*) a Scotchman in Calcutta opened an account with a banking and agency house there in 1786, and died in 1810, having been insane from 1793. A partner in the house being in Scotland in 1812, enclosed in a letter to the customer's relatives there, an account current with him from 1787 to 1810, signed by the firm, bringing out annual balances in his favour, composed of annual accumulations of Indian interest, the last balance expressed "to bear interest at 9 per cent. per annum." In 1835 the customer's relatives obtained administration of his estate and prosecuted actions which were before commenced in the Scotch Courts, on the account current against another partner who joined the firm in 1793, and continued a partner through several changes till 1820; and they claimed interest at 9 per cent. upon the last balance in 1810, and upon the annual accumulations thereof since.

It was held by the House of Lords that a debt was sufficiently constituted against the firm by the account rendered by them, together with interest at 9 per cent. on the last balance in 1810, down to the final decree in the case, but that the debt did not carry compound interest from 1810.

So also in *Williamson v. Williamson* (*w*), it was held that the right to charge compound interest upon an overdraft ceased upon

1 Ball & B. 420; *Rufford v. Bishop* (1829), 5 Russ. 346.

(*u*) *Mosse v. Salt* (1863), 32 L. J. Ch. 76; 32 Beav. 269. Cf. *London Chartered*

Bank of Australia v. White (1879), 4 A. C. 413, at p. 424.

(*v*) (1840), 8 Cl. & F. 121.

(*w*) (1869), 7 Eq. 542.

the death of the customer, and that thenceforth simple interest only was chargeable.

In *Crosskill v. Bower* (*x*), in 1847 the customer of a bank gave a mortgage to the bankers to secure, with interest at 5*l.* per cent., money due and to become due to them upon a running account, on which it had been usual to make annual rests, and charge compound interest on the balances. In 1855, the customer assigned his property to trustees for the benefit of his creditors. It was held that after the relation of banker and customer had thus ceased the bankers had no right to make rests, and accordingly that the mortgage was a security only for the balance due at the date of the assignment with simple interest from that time at 5*l.* per cent.

In this case Lord Romilly, M. R., laid down that where the account between a banker and his customer is kept at compound interest and the customer dies, the final balance at his death, in the absence of contract, carries no interest; and that it is the same where the balance is in the customer's favour and the banker dies or ceases to carry on business, or becomes bankrupt. So "a customer," said his Honour, "may say to his banker, 'I close my account with you, and I shall have no further dealings with you from this day;' thereupon the balance of the account, whichever way it may be, would have to be ascertained at that period, and then all interest would cease. It depends on the pleasure of the bankers, either to enforce payment of the balance due to them or to abstain from doing so, or to obtain such security for it as they may be able. If the last course were adopted, a new contract would be entered into, which would regulate the matter of interest."

So in *Graves v. Davies* (*y*) it was held that, on the death of a customer, the account ceases to be a banking account and the balance due is merely a simple contract debt, not bearing interest.

In *Morse on the Law of Banking* (*z*), it is stated that "death, insolvency, or settlement terminates a contract as to rate of interest

(*x*) (1863), 32 L. J. Ch. 540; 32 Beav. 86.

(*y*) (1866), 17 Ir. Ch. R. 227.

(*z*) (American), 4th ed. p. 536 (analysis).

See also p. 573.

on a deposit, and thereafter interest is calculated at the ordinary rate for simple debt.”

But in *Provincial Bank v. O'Reilly (a)*, where a testator had been in the habit of paying compound interest on overdrafts, the banker was held entitled after his death to simple, but not to compound, interest at the former rate on the amount due at his death until paid. *Graves v. Davies* and Lord Romilly's dictum to the contrary in *Crosskill v. Bower* were disapproved. This appears to be the correct view (*b*).

Income Tax.

A banker must allow income tax to a customer upon interest accruing on a mortgage debt (*c*).

But interest upon a loan by a banker to a customer for a period of less than a year is not within the words “any yearly interest of money or any annuity or other annual payment” in 16 & 17 Vict. c. 34, s. 40, and therefore the customer is not entitled to deduct income tax from such interest (*d*).

“In point of business,” said Lindley, L. J. (*e*), “a mortgage is not a short loan; but a banker's loan at three months is a totally different thing. That is a short loan, it is intended and understood to be a short loan, and the difference in practice between the two is perfectly well known to every business man.”

Money-lenders Act (f).

Bankers are exempted from the provisions of this statute (*g*).

(a) (1890), 26 L. R. Ir. 313.

(b) In *Bate v. Robins* (1863), 32 Beav. 73, it was held that, as between surviving partners and the representatives of a deceased partner, the accounts ought not to be continued at compound interest, notwithstanding that had been the practice up to the time of the death.

(c) *Mosse v. Salt* (1863), 32 Beav. 269; 32 L. J. Ch. 756.

(d) *Goslings and Sharpe v. Blake* (1889), 23 Q. B. D. 324.

(e) At p. 330 of the report of the case referred to in the last note.

(f) 63 & 64 Vict. c. 51.

(g) Sect. 6 (d).

CHAPTER VI.

COMMISSION.

APART from agreement to the contrary, either express or implied from the previous course of business, a banker has a right to a fair and adequate recompense for the services which he renders to his customer.

If he charges commission, in case of dispute, it will be a question for the jury whether it is reasonable (*a*). If any custom is proved as to charging commission in such cases, or as to its amount, this will be cogent evidence of what is reasonable (*b*).

It has been held reasonable to charge commission for procuring the acceptance and payment of bills (*c*).

So, also, where London bankers accepted and paid bills drawn in the country, being furnished with funds to pay the bills before they became due, and other bills at longer dates being lodged in their hands by way of security (*d*).

So a reasonable commission for discounting was held chargeable by a country banker in addition to the discount, although the advance was made through a London banker (*e*).

(*a*) See *Ex parte Gwyn* (1832), 2 Deac. & Ch. 12; *Winch v. Fenn* (1786), 2 T. R. 52, note (*c*); *Hammet v. Yea* (1797), 1 B. & P. 144.

(*b*) *Cohen v. Paget* (1814), 4 Camp. 96; *Roberts v. Jackson* (1817), 2 Stark. 225; *Eicke v. Meyer* (1813), 3 Camp. 412. See also *Murray v. Curry* (1836), 7 C. & P. 584; *In re Page* (1863), 32 Beav. 487; 11 W. R. 584.

(*c*) *Baynes v. Fry* (1808), 15 Ves. 120.

(*d*) *Masterman v. Cowrie* (1813), 3

Camp. 488. See also *Carstairs v. Stein* (1815), 4 M. & S. 192; *Curtis v. Livesey* (1790), 4 M. & S. 196, cited in the argument of counsel. These cases were, however, decided with reference to the Usury Laws, and did not expressly decide that the charges in question would have been valid in the absence of express agreement.

(*e*) *Ex parte Jones* (1810), 17 Ves. 332. See also *Baynes v. Fry* (1808), 15 Ves. 120; *Auriol v. Thomas* (1787), 2 T. R. 52.

In *Williamson v. Williamson* (*f*) a banking account which had been largely overdrawn had, for the half-year ending June, 1867, been charged with interest at 5 per cent., and with a gross sum of 500*l.* for commission, in lieu of the charge of one-half per cent. previously made. The pass-book balanced on this footing was sent to the customer, and the charges were explained to his agent (the customer himself being in weak health, and unable to attend to business matters). The customer died in December, 1867, without having raised any objection to these charges. It was held that the charge of 500*l.* had been acquiesced in and was valid for the half-year ending June, 1867; but that acquiescence could not be inferred for the subsequent half-year, there being nothing in the entry for the particular half-year that amounted to a contract to the same effect *in futuro*. In lieu of the 500*l.* for the second half-year a half per cent. upon the turnover was allowed.

Incidentally the question of commission was discussed in the two following cases.

In *In re Imperial Land Co. of Marseilles, In re National Bank* (*g*), upon a motion that the National Bank, and three of its directors, might be ordered to pay to the liquidators of the company a sum of 5,000*l.*, alleged to have been improperly paid out of the funds of the company as an inducement to the bank to open an account with the company, it was held that the payment for opening an account with the banker was a misappropriation of the funds of the company; but that, as there was no direct proof that this money was paid by the company, the Court could make no order upon a motion under sect. 100 of the Companies Act, 1862, for its restoration; and that the Court being of opinion that a banker was not an officer of the company within sect. 165 of the Act, no order could be made under that section. Leave was given to file a bill against the directors.

In the course of his judgment, Vice-Chancellor Malins said: "Mr. Parker, the manager of the bank, has made an affidavit, and he admits that it is the only instance in which he ever heard of this bank or any other bank having done such a thing. He says it is sometimes usual for a bank to receive commission from its cus-

(*f*) (1869), 7 Eq. 542.

(*g*) (1870), 10 Eq. 298.

tomers; and everyone is aware that if a customer has a troublesome account with a banker, and is unable to keep a balance to remunerate him for his trouble, it is not unusual for a banker to make a charge as commission for keeping the account. But Mr. Parker admits, on his cross-examination, that no other company ever made such an offer as this, and that it is a thing wholly without precedent. What excuse was there for this? Was it a troublesome account? . . . I find . . . that the balance was never reduced so low as 8,000*l*."

In *In re English Bank of the River Plate, Ex parte Bank of Brazil* (*h*), a bank at Rio de Janeiro drew bills of exchange on a bank in London, and they were duly accepted by such bank. The London bank went into liquidation before the bills matured, and, after the stoppage of the bank, the holders had them protested for better security, and they were accepted *supra* protest for the honour of the drawers by the drawers' London bankers. The bills were duly presented for payment to the acceptors and were protested by the holders for non-payment. They were then presented to the bankers of the drawers, who paid the principal money due on the bills together with the notarial charges thereon, which consisted partly of the expenses of protest for non-payment and partly of the expenses of protest for better security. The bankers of the drawers also charged the drawers a commission for accepting the bills. The drawers were admitted to prove in the winding-up of the London bank for the amount of the bills, and they claimed to prove also in respect of the notarial charges and commission. This claim the liquidator rejected. It was held, upon a summons for leave to prove in respect of the latter claims, that the applicants were entitled to prove for the expenses of protest for non-payment, as being expenses falling within sect. 51, sub-sect. 2, and sect. 57, sub-sect. 1 of the Bills of Exchange Act, 1882, but that they were not entitled to prove in respect of the expenses of protest for better security nor for the commission, as under sect. 57 such expenses only as are "necessary" are recoverable.

In the course of his judgment Chitty, J., said: "The remaining question relates to the commission. It consists of a sum of

533*l.* 15*s.*, being at the rate of one-quarter per cent., paid by the applicants to their bankers for the acceptance of the bills for honour and for providing the money required to meet that acceptance. It is then the sum paid by the drawers for borrowing or obtaining an advance of money to meet the bills for their honour. . . . No evidence has been adduced of any mercantile custom. One authority only was relied on, viz., *Prelm v. Royal Bank of Liverpool* (i). But the action there was brought not on the bill of exchange, but on a special contract which justified the Court in allowing the claim for commission as special damages. The decision, therefore, is not in point. To this I add that the normal measure of damages for non-payment of money is interest where interest is allowable by contract or by law. The claim for commission cannot, therefore, be sustained."

Upon a mere advance, as distinguished from a current account, interest only, and not commission, can be charged apart from a special custom (k).

In an action brought by a steamship company to recover a balance of particular and general average contribution under a time policy of marine insurance and under an average statement, Kennedy, J., allowed a claim for 64*l.* for bankers' charges on amounts remitted to New Zealand (where temporary repairs had been done) and overdrafts. His Lordship thought it right in reason, and in accordance with English usage, to treat as part of the cost of the repair of damage in a foreign port expenses reasonably and properly incurred in providing for payment there, as well as the mere cost of transmitting the funds to the foreign port (l).

Bankers Acting in Fiduciary Capacity.

It is a general rule of law that one who is a trustee or executor is not entitled, in the absence of express provision, to remuneration for his services. This rule applies to bankers.

(i) (1870), L. R. 5 Ex. 92.

(k) *Spencer v. Wakefield* (1887), 4 T. L. R. 194, where it was sought to establish a custom among northern bankers to treat a case of advances, where every half-year a balance is struck and a rest

made in the account, as a current account and to charge commission thereon.

(l) *Agenorina Steamship Co. v. Merchants' Marine Insurance Co.* (1903), 19 T. L. R. 442.

In *Crosskill v. Bower* (*m*), by an assignment for the benefit of creditors, full powers of borrowing money at interest from bankers and others were conferred upon the trustees. Two of them carried on business as bankers in partnership with other persons, and the third was a clerk in the bank. An account was opened by the trustees with the bank, and advances were made upon this account, in respect of which the banking firm claimed to make annual rests and to charge interest on the balances according to their usual practice as bankers. It was, however, held that, having regard to the fiduciary position of the trustee partners, only simple interest could be allowed (*n*).

(*m*) Cited at p. 183, *supra*.

(*n*) Cf. *Douglas v. Archbutt* (1858), 2 De G. & J. 148; *Miller v. Beal* (1879),

27 W. R. 403; *Williamson v. Hine*, [1891] 1 Ch. 390; 63 L. T. 682.

CHAPTER VII.

COMPUTATION OF THE BALANCE.

NATURALLY it often becomes a matter of great importance to ascertain what, at a particular moment, is, or rather ought to be, the precise amount of the balance on either side of the account.

In this connection the considerations discussed in the foregoing chapters of this Part may have to be considered generally. But in most cases the only questions arising will be those referred to here.

Crediting Payments in.—This subject is dealt with in detail at pages 143—148, from which it appears that the banker is bound to give his customer credit for what he has paid in, or what the banker has received, or ought to have received, on his behalf, with reasonable and customary promptitude.

Moreover, if, according to the usual practice of bankers in a particular locality with regard to cheques of a certain class, a banker credits a cheque on another banker as cash before it is cleared, he is bound to take the amount into calculation in favour of his customer from the time of so entering it.

“The moment,” said Lord Lindley, in *Capital and Counties Bank v. Gordon (a)*, “a bank places money to its customer’s credit the customer is entitled to draw upon it, unless something occurs to deprive him of that right.”

The Course of Business.—Moreover, if by the course of business prevailing between the banker and his customer a particular

(a) [1903] A. C. 240, at p. 249.

system of accounting has been established, the banker cannot depart from it without giving reasonable notice.

Thus, if advances made by the banker against cover, in respect of a particular class of transactions, have been habitually excluded from the debit side of the account pending the realization of the security, the customer will be entitled to rely upon the continuance of the system until he receives notice to the contrary.

In *Cumming v. Shand* (b) C., a merchant who received consignments of goods from abroad, was accustomed to deliver to a bank where he kept an account the bills of exchange drawn on him against such consignments, together with the bills of lading. The bank paid the bills of exchange and placed the amount to C.'s account, and they handed over the bills of lading to a broker on receiving his undertaking to repay the amount of the bills of exchange out of the proceeds of the goods when sold. On these occasions, if the sum so placed to C.'s debit was taken as an actual debit, his account was overdrawn, but if that sum was not regarded there was a balance in his favour. C. was, nevertheless, allowed to draw against his cash account as if the amount advanced had not been placed to his debit. At length, some goods remaining unsold and the market price having gone down, the bank refused to pay a cheque drawn by C., whereupon he brought an action. It was held that it was properly left to the jury to say whether the course of dealing between C. and the bank was on the footing that he was to be allowed to draw against the cash part of his account, and that the sums guaranteed by the broker were not to be taken into account against him unless the goods failed to satisfy them, or whether the bank was merely in the habit of indulging him by allowing him to overdraw his account; and, if the former, that C. was entitled to a reasonable notice that the bank declined to continue that course of dealing.

"No doubt," said Chief Baron Pollock, "if a person has been accustomed to accept bills for the accommodation of another he may refuse to do so any longer; for there is no tenancy of a man's credit which requires any time to put an end to it. But that is not the case where a course of dealing has prevailed, and value has

been given for the accommodation. It makes no difference whether the one party is a factor or a banker if the circumstances are such as to justify the other in drawing though he has not a cash credit; he is entitled to do so until he has notice that the accommodation is discontinued" (c).

Agreement for Overdraft.—The case will be similar where the banker has agreed to allow an overdraft.

As to such an agreement, Lord Herschell, in *Rouse v. Bradford Banking Co.* (d), said: "The transaction is, of course, of the commonest. It may be that an overdraft does not prevent the bank who have agreed to give it from at any time giving notice that it is no longer to continue, and that they must be paid their money. This I think at least it does; if they have agreed to give an overdraft they cannot refuse to honour cheques or drafts, within the limit of that overdraft, which have been drawn and put in circulation before any notice to the person to whom they have agreed to give the overdraft that the limit is to be withdrawn. That effect I think it has in point of law; whether it has more than that in point of law it is unnecessary to consider. Even if it has no greater effect in point of law, it is obvious that neither party would have it in contemplation that when the bank had granted an overdraft it would immediately, without notice, proceed to sue for the money; and the truth is that, whether there were any legal obligation to abstain from so doing or not, it is obvious that, having regard to the course of business, if a bank which had agreed to give an overdraft were to act in such a fashion, the results to its business would be of the most serious nature."

If the banker undertakes to honour a particular cheque, provided a certain sum is paid in or a specific security given, and the latter is paid in or given accordingly, he will be bound to honour the cheque as agreed (e).

But where title deeds have been deposited as security for any

(c) See also *Kymer v. Laurie* (1849), 18 L. J. Q. B. 218. As to computation of the balance when outstanding discounted bills exceed the cash balance, see p. 701, *infra*. *Agra and Masterman's Bank v. Hoffman* (1864), 34 L. J. Ch. 285,

cannot be treated as an authority on this point.

(d) [1894] A. C. 586, at p. 596.

(e) *Fleming v. Bank of New Zealand*, [1900] A. C. 577.

balance due on a current account, and afterwards the banker receives notice of the conveyance of the property as security to another party, and accordingly intimates to his customer that the overdraft cannot be continued without further security and this is not given, he will not be bound to honour his customer's cheques (*f*).

A banker will not be justified in transferring the balance standing to a customer's credit on the current account to a separate loan account, and dishonouring bills and cheques outstanding which the former would have been sufficient to meet, or in otherwise closing the current account to the prejudice of the customer's credit, if the course of business was that the customer was to be allowed to draw upon his current account without reference to his loan account, and no reasonable notice that such course of business would be discontinued by the bank has been given (*g*).

So, in *King v. British Linen Co.* (*h*), a bank on the 22nd October, 1896, gave notice to a customer, a merchant, that it intended to retain the money at the credit of his account current pending the settlement of a claim which they made against him. Thereafter, while there were sufficient funds at the customer's credit, the bank refused payment of a cheque which had been drawn prior to, though not presented until after, the date of the notice. It was held that the bank was liable for breach of contract and in substantial damages for injury to credit without proof of special damage.

Accounts at different Offices.—In the absence of express agreement the banker is only bound to recognise a balance in favour of his customer on his account at the office upon which the cheque is drawn, but he is entitled to take into consideration a balance against his customer on an account at another branch.

That the banker is usually only bound to consider the state of his customer's account at the office upon which the cheque is drawn

(*f*) *Parkinson v. Wakefield & Co.* (1889), 5 T. L. R. 646. See Part VIII. Chap. 7, Sect. 1, "Mortgage by Deposit—Subsequent Advances."

(*g*) See the summing-up of Mathew, J., in *Buckingham v. London and Midland Bank* (1895), 12 T. L. R. 70. Cf. *Agra*

and *Masterman's Bank v. Hoffman* (1864), 34 L. J. Ch. 285; 11 Jur. N. S. 335; 11 L. T. 701; 13 W. R. 226; per Malins, V.-C., in *Thomas v. Howell* (1874), 18 Eq. 198, at p. 202.

(*h*) (1899) 1 Sc. Ses. Ca. (5th ser.) 923.

is a necessary conclusion from the course of business and the nature of the case (i). But a special agreement must of course be observed. Thus, in *Shillibeer v. Glyn* (k), it was held that, where a person had paid a sum into a bank in one place, and, at the time, the bankers had agreed to pay the same sum elsewhere, the latter would be liable in damages if they failed to carry out this undertaking.

The right of the banker to blend accounts as against his customer is illustrated by *Garnett v. M'Kewan* (l). There the plaintiff, having an account at the L. branch of the defendant's bank which showed a balance to his credit exceeding 23*l.*, drew cheques to that amount on that branch. At the same time he was indebted to the bank at their B. branch in an amount which, having regard to both accounts, reduced his assets in the bank's hands to a few shillings only. The bank, without any notice to him, transferred the B. debt to the L. branch, and refused to pay the cheques on presentment. There was no special contract between the parties that each account should be kept separate. It was held that the bank was entitled at any time to combine the accounts and to charge the L. account with the B. debt.

"The mere existence," said Baron Martin, "of an apparent balance, if there is no real balance, is not enough to render the bank liable to pay a cheque at the branch where the apparent balance is. There was no evidence that in this case the bankers undertook to cash cheques at one branch when the whole accounts showed that the customer had no sufficient balance. No special contract, nor any usage or course of dealing to that effect, was proved." Baron Pigott added: "No one would say that a banker might set off against his customer's account a debt due to him from his customer in another capacity, a private debt, for example, or a debt due to him as carrying on some distinct business. Nor has a banker any right to confound two accounts lodged with him by one person in two different capacities. He would have no right to blend a personal and a trust account. But here there is nothing to prevent the banker from taking into account the state of the

(i) See pp. 86, 87, *supra*.

(k) (1836), 2 M. & W. 143.

(l) (1872), L. R. 8 Ex. 10.

plaintiff's balance as a whole; and upon such account being taken, it appeared that the plaintiff had no sufficient assets to meet the cheques presented. The banker was therefore justified in dishonouring them."

Deposit Account.—A banker is under no obligation to take into consideration money on a deposit account in deciding whether or not he will honour a cheque. The very nature and purpose of such an account seem to exclude any such obligation; and the condition as to notice of withdrawal, which at the present time is usually a part of the transaction, constitutes an express provision to the contrary (*m*).

In *In re Tidd, Tidd v. Overell* (*n*), North, J., said: "The usual practice when money is paid in on a deposit account is, that the deposit note is handed back in exchange for the money; possibly, also, notice is necessary before money on deposit can be called back."

And in *In re Head, Head v. Head* (No. 2) (*o*), where money had been transferred from a current account to a deposit account, the Lords Justices emphasised the distinction between the two kinds of accounts. "It seems to me," said Lindley, L. J., "that the case is the same as if the customer had drawn a cheque for the amount and put the money in afresh on a deposit account, the money being paid out and re-lent on a totally different contract from that which existed in regard to the current account. . . . Where the money was placed on deposit the course of dealing with it was changed." Similarly, Lopes, L. J., said: "The treatment of the current account was different altogether from that of the deposit account. While the money was on a current account it was payable on presentation of a cheque, and it carried no interest; when it was placed on deposit it bore interest, and was no longer payable on a cheque, but it was only payable after twenty-one days' notice" (*p*).

(*m*) Notice is not, however, always insisted upon in fact. When waived it is the custom for the banker to deduct from the interest which has already accrued in favour of the customer an amount equal to that which would have

accrued during the period for which notice should have been given.

(*n*) [1893] 3 Ch. 154, at p. 156.

(*o*) See p. 17, *supra*.

(*p*) See also *Atkinson v. Bradford, &c. Building Society* (1890), 25 Q. B. D. 377.

The dictum of Malins, V.-C., in *Hopkins v. Abbott* (q), to the contrary, seems unwarranted, and, at all events, it may be safely disregarded where there has been an express stipulation for notice (r).

The subject of deposit receipts generally is treated in Chap. 3 of Part VI.

Absence of Disposing Power.

It may happen that the customer has lost the right of disposing of the amount standing to the credit of his account.

The circumstances in which this occurs are considered in Chap. 11 of this Part.

(q) (1875), 19 Eq. 222, at p. 228.—There money had been deposited upon receipts in the following form: "Received of Miss Elizabeth Badcock one hundred and fifty pounds, to account for on demand. (Signed) J. Barrett." In deciding that it did not pass under a certain bequest, the Vice-Chancellor said: "As between the banker and his customer, the contract must be taken to depend upon the written document by which the banker acknowledges the receipt of a sum of money to be accounted for on demand; and if the customer, under such circumstances, were to overdraw his current account,

and the banker were to dishonour a draft while he had money of his customer in his hands upon deposit account, upon such a receipt as was given in this case, the banker would be liable to an action for damages. I must regard the money, then, as if it were money in the hands of the bankers on an ordinary drawing account, and must hold that it does not pass under the bequest of securities for money."

(r) It may be observed that deposit receipts, made repayable at fixed periods of one or more years, are often issued by Australian banks.

CHAPTER VIII.

THE PASS-BOOK.

THE method of keeping this book has remained substantially the same for at least a century (*a*).

Effect of Entries.

I. **In Favour of the Customer.**—An entry in a pass-book, so far as it is in favour of the customer, is evidence against the banker. But it is open to him to rebut this evidence by showing that the entry was wrongly made, unless, and except in so far as, the customer, relying upon its accuracy, has altered his financial position.

In itself an entry is primarily a mere admission, and as such may be contradicted, and shown to have been made under a mistake. But it is also a representation by an agent to his principal, and accordingly, if acted upon, will give rise to an estoppel.

In *Gaden v. Newfoundland Savings Bank* (*b*), where a cheque had been credited as cash in the pass-book by the respondents, Sir Henry Strong, delivering the judgment by the Privy Council, said: "The entry in the pass-book has been much relied on as showing that the respondents accepted the cheque as cash; but such entries are not conclusive: they are admissions only, and, as in the case of receipts for the payment of money, they do not debar the party sought to be bound by them from showing the real nature of the transactions which they are intended to record."

(*a*) See the report of the Master in *Devaynes v. Noble* (1816), 1 Meriv. 529, at pp. 535—537.

(*b*) [1899] A. C. 281, at p. 286.

Accordingly, in an action by a customer for an alleged balance appearing by the pass-book, evidence showing error or mistake is admissible (c). This will be so even although the printed rules of the bank declare that "for money paid into the account the entry in the pass-book must be initialled by both the agent and accountant to make the receipt complete and binding on the bank," and the entry in question has been so initialled (d).

The question whether there has been a mistake is one of fact to be determined upon the evidence; for example, where the banker alleges that the entry has been by mistake made on the wrong side of the pass-book, but the customer denies that there has been any mistake (e).

The limitation upon the banker's right to contradict the pass-book was indicated by Mr. Justice Bayley, delivering the judgment of the Court of King's Bench, in *Heane v. Rogers* (f): "The express admissions of a party to the suit, or admissions implied from his conduct, are evidence, and strong evidence, against him; but we think that he is at liberty to prove that such admissions were mistaken or were untrue, and is not estopped or concluded by them, unless another person has been induced by them to alter his condition. In such a case the party is estopped from disputing their truth with respect to that person (and those claiming under him), and that transaction" (g).

"Every prudent man," said Lord Chief Justice Abbott in *Skyring v. Greenwood* (h), "accommodates his mode of living to what he supposes to be his income. It therefore works a great prejudice to any man if, after having had credit given him in account for certain sums, and having been allowed to draw on his agent on the faith that those sums belonged to him, he may be called upon to pay them back." So Mr. Justice Bayley, in the same case, referring to a supposed action to recover money wrongly credited

(c) *Commercial Bank of Scotland v. Rhind* (1860), 3 Macq. H. L. R. 643.

(d) *Ibid.*; *Couper's Trustees v. National Bank of Scotland* (1889), 16 Rettie (4th ser.), 412. See also *Bransby v. East London Bank*, cited at p. 145, *supra*.

(e) *Snead v. Williams* (1863), 9 L. T. N. S. 115.

(f) (1829), 9 B. & C. 577, at p. 586.

(g) See *Deutsche Bank (London Agency) v. Beriro & Co.* (1895), 1 Com. Cas. 255, cited in Part VII. Chap. 3.

(h) (1825), 4 B. & C. 281, at p. 289.

to the client, and drawn out by him, said (i) : " It would have been a good defence to that action to say that the defendants had voluntarily advanced money to the deceased when he asked no credit, and that they had told him that they had received the money for his use, and that, on the faith of their representation, he had drawn it out of their hands as his own money, and had been induced to spend it as such ; and if they could not recover the money back neither ought they now to be allowed to retain other moneys belonging to the deceased, upon the ground that they have paid or allowed him in account money which they had not in fact received to his use, but which they suffered him to consider his own for a long period of time."

It is obvious that, in the determination of the question of fact as to whether the customer has been led to act upon the faith of the mistaken credit in a way that he would not otherwise have done, the length of time during which the error has remained unrectified may be important.

Where the inaccurate entry which has misled the customer was made by the banker intentionally, and not by mistake, he will, *à fortiori*, be bound by it. " In consequence of that account," said Mr. Justice Holroyd in *Shaw v. Picton* (k), " the defendant drew for sums which he thought he was entitled to receive. Assuming that they " (*i.e.*, Howard and Gibbs, acting as bankers) " really had not received those sums, yet they held out that they had received them, and they voluntarily took upon themselves to give credit for the payment of those sums to another person. The defendant drew for them, not as sums advanced to him by way of loan, but as money represented by Howard and Gibbs to have been received by them to his use, or as money not received, but for which they had agreed to make themselves accountable. It appears to me that the payment of those sums by Howard and Gibbs, under such circumstances, did not constitute a loan of money to the defendant, nor was it money received to the use of the bankrupts " (*i.e.*, the bankers), " which the defendant is now bound to refund."

In *Eyles v. Ellis* (l) the plaintiff and defendant each kept an

(i) At p. 290.

(k) (1825), 4 B. & C. 715, at p. 731.

(l) (1827), 12 Moo. C. P. & Ex. 306 ; 4 Bing. 112.

account with the same banker. The plaintiff desired the defendant to pay in to his account a sum due to him for rent. The defendant wrote stating that he had caused the amount to be transferred to his account, and the banker wrote to the plaintiff to the same effect. At the time the transfer was made in the books of the banker, the defendant's account was overdrawn. The bank having stopped payment, it was held that the transfer was equivalent to payment by the defendant to the plaintiff. "Though no money was actually transferred," said Best, C. J., "yet as the bankers gave the plaintiff credit for the amount, that was equivalent to an acknowledgment by them that they had received the rent from the defendant on account of the plaintiff. The plaintiff might then have drawn for the sum thus transferred."

So, in *Capital and Counties Bank v. Gordon* (m), Lord Lindley said: "The moment a bank places money to its customer's credit the customer is entitled to draw upon it, unless something occurs to deprive him of that right."

But where a banker gave credit for a sum, describing it as "money not yet received," and in fact never received it, he was held to be entitled to be allowed the sum in account by the customer, although he had debited him with commission upon it (n).

II. In Favour of the Banker.—In the present state of the authorities it is impracticable to define with confidence the effect of entries in a pass-book in favour of the banker who has made them.

Where the customer has so acted as to render the entries a settled or stated account, and has been guilty of negligence with regard to them, in consequence of which the banker has altered his own position to his disadvantage, it is safe to say that the customer is precluded from disputing their accuracy.

But what acts or omissions on the part of the customer will

(m) [1903] A. C. 240, at p. 249. See pp. 147—148, *supra*.

(n) *Shaw v. Dartnall* (1826), 6 B. & C. 56.—A banker who allows the manager of a company which keeps its account with him to make entries in the pass-book which deceive the accountants

employed by the company to check the accounts of the manager, may be held liable on the ground of negligence for consequent loss sustained by the company: *Brighton Empire and Eden Syndicate v. London and County Banking Co.* (1904), "Times," 24th March, p. 13.

amount to a settlement of account, or to negligence in the matter, can hardly be ascertained from the English cases.

It is, however, submitted that something more than the receipt by the customer of the pass-book and cashed cheques, and the return of the former to the banker, is necessary to render the account stated or settled; and that the mere omission on the part of the customer to examine the entries and cheques with business-like promptitude and care does not constitute negligence.

In *Vagliano Brothers v. Bank of England* (o) the judgment of the majority of the Court of Appeal, consisting of Cotton, Lindley, Bowen, Fry and Lopes, L. JJ., contains the following observations, which do not appear to be affected by the reversal of the judgment in the House of Lords. "The plaintiff from time to time received from the Bank his pass-book, with entries debiting the payments made, for which the Bank sent the bills as vouchers, which were retained by the plaintiff when he returned without objection the pass-books. It was contended that this was a settlement of account between him and the Bank, and that he had been guilty of such negligence with respect to the examination of the vouchers as would have prevented him from being relieved from this settlement of account. But there was no evidence to show what, as between a customer and his banker, is the implied contract as to the settlement of account by such a dealing with the pass-book, or that, having regard to the ordinary course of dealing between a banker and his customers, the plaintiff had done anything which can be considered a neglect of his duty to the Bank or negligence on his part" (p).

It would seem that where a half-yearly or other periodical balance has been struck and a fresh series of items commenced, and the pass-book containing these entries has been returned by the customer to the banker, the account should be considered settled. But a mere tentative balance pencilled in during the

(o) (1889), 23 Q. B. D. 243, at p. 263.

(p) Cf. the language of Lords Halsbury and Selborne in the same case in the House of Lords, [1891] A. C. 107, at pp. 115, 116, 128; of Lord Selborne delivering the judgment of the Court of

Appeal in *Blackburn Building Society v. Cunliffe, Brooks & Co.* (1882), 22 Ch. D. 61, at pp. 71-2 (reported, on appeal to the House of Lords, 9 A. C. 857); and of Grant, M. R., cited at pp. 168-9, *supra*.

currency of the account between the dates upon which the account is formally balanced and re-commenced does not, it is conceived, add anything to the effect of the items themselves.

It has been held that a pass-book delivered to a customer in which there are entries on one side only is not evidence of a settled account between the parties, although the customer has kept the book without making any objection to the entries contained in it (*q*); and also that, in the case of a pass-book with entries on both sides, as ordinarily made, where no balance has been struck and no signature written at the foot of the account, it is an account current and not a settled account (*r*).

On the other hand, where, in an account, credit had been given to a customer for certain sums as for money received by the banker, they never having been in fact received by him, and in other accounts subsequently delivered the same sums had been placed to his debit and balances struck accordingly, without objection on his part, it was held that he had assented thereto. It was also held that the fact that the customer had sued the person by whom the sum was payable at the time when he knew of the debit entry was evidence of his assent to the latter (*s*).

As to what will amount to negligence on the part of the customer so as to preclude him from disturbing a settled account, if the banker has in consequence altered his position to his disadvantage, it is submitted that, while a mere omission to examine the pass-book, unless it extends to a very considerable period, cannot be imputed to the customer as such negligence, yet if he has ticked the debit entries with the cheques to which they relate in his possession and has failed to detect a forgery in one of the latter, to this extent he will be guilty of negligence; or, which will have the same effect, he may be treated as having ratified the payment by the banker (*ss*).

(*q*) *Ex parte Rundleston* (1833), 2 Deac. & Ch. 534.

(*r*) *Commercial Bank of Scotland v. Rhind* (1860), 3 Macq. H. L. R. 643.

(*s*) *Shaw v. Dartnall* (1826), 6 B. & C. 56. See also *Williams v. Griffith* (1839), 5 M. & W. 300; and the judgments in

Woods v. Thiedemann (1862), 1 H. & C. 478; *Mosse v. Salt* (1863), 32 L. J. Ch. 756; 32 Beav. 269; *Williamson v. Williamson* (1869), 7 Eq. 542; *Ashby v. James* (1842), 11 M. & W. 542; *Spencer v. Wakefield* (1887), 4 T. L. R. 194.

(*ss*) See, however, *Chatterton v. London*

This subject is further dealt with in another connection in Part III. Chap. 7.

The following statement, in Morse on the Law of Banking (*t*), appears to represent the law of this country as to the pass-book: "Mistakes may be corrected by either party, subject to the rule that each party must bear any loss resulting to the other by reason of acting on the faith of an entry made by him or his negligent acquiescence. . . . Silence may estop the depositor as to charges actually made in account stated to him, but cannot give authority for future similar charges."

On the other hand, the following passage from the same work, which doubtless represents the balance of authority in the United States, is inserted here in order to indicate the direction in which the law of this country appears to be likely to tend, rather than as a statement of it as it at present is: "The weight of reason and authority," it is said (*u*), "is now strongly in favour of the rule that the depositor must answer to the bank, under the general principles of estoppel and responsibility for loss caused by negligence, for any damage resulting to the bank by reason of its having acted or omitted to act upon faith of the depositor's silence, when he might have discovered the fraud, forgery or mistake, by reasonable care in examining his accounts with the bank" (*v*).

Collusive Omission.

Where a banker, colluding with one member of a firm who were his customers to keep the other members in ignorance of certain bill transactions of that member in the name of the firm, omitted to enter the bills in the pass-book of the firm (the bills being paid with moneys supplied by that partner without the know-

and County Banking Co. (1891), "Times," 21st Jan., p. 3. This case is reported, upon its first trial, in the Journal of the Institute of Bankers (1890), Vol. XI. p. 333.

(*t*) (American), 4th ed. p. 536 (analysis).

(*u*) *Ibid.* p. 548.

(*v*) This subject is discussed with much elaboration and ingenuity by Sir John Paget, Bart., K.C., in his Gilbert Lectures for 1903, printed in the Journal of the Institute of Bankers, Vol. 24, at pp. 270, 306, 464.

ledge of the other members of the firm), it was held that the latter could maintain an action against the banker for damages sustained by them in consequence (*w*).

Forgery.

Making a false entry, or altering an entry, in a pass-book, or what purports to be a pass-book, with intent to defraud, by making it appear that the banker has received a sum which, in fact, he has not, constitutes forgery of an accountable receipt for money under 24 & 25 Vict. c. 98, s. 23 (*x*).

Change in Bank.

A change in the title of a banking firm in a pass-book, and entries therein to the credit of the new firm of the interest of securities given by the customer to the original firm, will amount to notice of the assignment to the new firm of the securities given by the customer to the old firm (*y*).

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| <p>(<i>w</i>) <i>Longman v. Pole</i> (1828), M. & M. 223.</p> <p>(<i>x</i>) <i>Reg. v. Moody</i> (1862), Leigh & C. 173; <i>Reg. v. Smith</i> (1862), Leigh & C.</p> | <p>168. See also <i>Rex v. Harrison</i> (1777), 1 Leach, 180.</p> <p>(<i>y</i>) <i>Cavendish v. Geaves</i> (1857), 24 Beav. 163; 27 L. J. Ch. 314.</p> |
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CHAPTER IX.

VOLUNTARY DISCLOSURE TO STRANGERS.

How far a banker is under an obligation to his customer to refrain from disclosing the state of his account to a stranger is not clear.

It follows from this that, when a cheque is presented for an amount exceeding that of a customer's balance, the banker will act most prudently in limiting the information which he gives to the holder to the statement, "Not sufficient assets."

I. Apparently a banker will be liable to his customer if he discloses the state of his account to one of the customer's creditors for the purpose of giving him an advantage over his other creditors.

In *Foster v. Bank of London* (a) the defendants had disclosed the state of the plaintiff's account to another of their customers, who was one of his creditors and held a bill accepted and a cheque drawn by him. They thereby enabled the customer who held the bill and cheque to pay in the difference between the amount of the latter and the amount of the balance of the other customer, and so to obtain payment of that balance in priority to the other creditors. Lord Chief Justice Erle held that it was a question for the jury whether there was a duty upon a banker not to disclose the state of his customer's account. The jury found that there was such a duty. The Chief Justice, in the course of the argument of the case, said that the banker could not go further than to say, "Not sufficient assets."

II. On the other hand, a banker is justified in disclosing to a third party the state of his customer's account upon a reasonable and proper occasion, as, for instance, if he does so for the purpose and with a reasonable prospect of thereby obtaining assistance for his customer.

In *Hardy v. Veasey* (b) the plaintiff, on the 24th of December,

(a) (1862), 3 F. & F. 214.

(b) (1868), L. R. 3 Exch. 107.

1866, had an overdrawn account at the defendants' bank. The defendants had in their hands certain cheques of the plaintiff, which there were no assets to meet. The defendants' manager, Wise, communicated with the plaintiff, who promised before the evening of that day to pay into his account a certain sum of money which he expected to take on the market. Relying upon this promise, Wise paid some further cheques presented during the day. The plaintiff, however, failed to pay in so large a sum as he had led the manager to expect, or such a sum as was sufficient to meet the outstanding cheques. In the evening of the day the manager, without the plaintiff's authority, communicated to one Mutton, a money-lender of the neighbourhood, the state of the account, with the view of obtaining assistance for the plaintiff.

At the trial, Mr. Justice Byles, in effect, held that the question for the jury was whether the communication was made upon a justifiable occasion. One of the ways in which he put the question was this: "Whether the communication to Mutton of the state of the plaintiff's account was an officious and unjustifiable one." He added: "If it was made with a reasonable hope and an honest intention of getting assistance for the plaintiff, I should doubt whether the action is maintainable." The jury returned a verdict for the defendants. A new trial was refused by the Court of Exchequer on the ground that, assuming the existence of a legal duty on a banker not to disclose his customer's account, except upon a reasonable and proper occasion, the question of whether the disclosure was made on such an occasion was rightly left to the jury.

Lord Chief Baron Kelly said: "We are not called on in this case to decide the question whether a legal duty is imposed on bankers to keep reasonably secret the state of their customers' accounts; that is a question well worthy of consideration, and upon which I will express no opinion. No doubt cases have been presented to us which have a somewhat contrary tendency, but it is not pretended that the negative has ever been decided by a Superior Court of law; and, though it may be thought that such a duty is rather moral than legal, I should hesitate much before setting aside the opinion expressed by the late Chief Justice of the

Common Pleas in the case of *Foster v. Bank of London* (c). It is impossible to reconcile his language in that case with a total absence of any such legal duty, for undoubtedly he there allowed an action to be maintained by a customer against his bankers which could not possibly have lain if no such obligation existed. . . . But here the question left to the jury was, assuming such a relation to have existed between the parties as that it would have been a violation of duty in the defendants to disclose the plaintiff's account, except on a reasonable and proper occasion, was there here a reasonable and proper occasion for the disclosure? The jury have found that there was."

Baron Martin said: "I also should be sorry on the present occasion to pronounce an opinion, whether or not the law will imply a contract by a banker not to communicate the state of his customer's account, except on a reasonable and proper occasion. There may be such a duty, but I confess I should like to see some authority in its support. It is one thing to be under a moral duty to do a thing, another to be bound by a contract. If the latter were made out, then the banker would be instantly liable for nominal damages on making the communication, though no injury whatever resulted. But if, from the relation between the banker and his customer, a duty is implied in the former not to do any act to the damage of his customer, the position would be much easier to understand. I am not inclined to give an opinion on either point, but should be glad to be directed to an authority. As to the case of *Foster v. Bank of London*, there was an obvious conspiracy between the Bank and one customer to give him an advantage over the other creditors of the plaintiff, who was also a customer. . . . Here, however, . . . it is clear that the jury had the whole matter before them, and that they have made up their minds upon the point of whether or not the occasion was justifiable."

Baron Channell said: "I can see no misdirection in the manner in which the question was left to them" (*i.e.*, the jury), "and their finding seems to be warranted by the evidence. The case cited of *Foster v. Bank of London* seems correct; and if the

(c) See p. 205, *supra*.

observations of the Chief Justice are taken in connection with the facts of that case, there is no ground to complain of them. . . . It was not so much there the case of a disclosure of the customer's account, as of a trick, by which the Bank conspired with one of the plaintiff's creditors to the prejudice of the rest; and the language of the Chief Justice is guarded, for he says emphatically that he knows no law *against* the action being maintainable."

III. It is conceived that a banker will be liable for any actual damage sustained by his customer in consequence of an unreasonable disclosure to a third party of the state of his account.

There appears to be no sufficient ground for importing into the contract between the banker and his customer an implied undertaking on the part of the former that he will not unreasonably disclose the state of the account of the latter, so as to render the banker liable for nominal damages for such disclosure, even where no damage to the customer has ensued. But the balance of judicial opinion as declared in the above-cited cases, as well as general principles, seem to favour a liability limited to the actual damage sustained by the customer. It is true that in *Tassell v. Cooper* (*d*), where the question of the existence of this liability was raised, Justices Maule and Williams indicated a view to the contrary. But Mr. Justice Cresswell, who was also present, seems to have abstained from expressing an opinion upon the point, and the case can hardly be considered a clear authority upon it, especially in view of the judgments in the later case of *Hardy v. Veasey* (*e*).

IV. A statement as to a customer's general financial position and character, founded upon a knowledge of his account, but not giving detailed information as to it, made in confidence by the banker, in answer to an enquiry by or on behalf of a person proposing to enter into business relations with the customer, is a privileged communication, and not actionable as a libel although disparaging (*f*). It is conceived that it is, moreover, no breach of duty towards the customer.

(*d*) (1850), 9 C. B. 509, cited at p. 224, *infra*.

(*e*) See p. 205, *supra*. Cf. *Taylor v. Blacklow* (1836), 3 Bing. N. C. 235; 3 Scott, 614.

(*f*) See per Brett, L. J., in *Waller v. Loch* (1881), 7 Q. B. D. 619, at p. 622; 51 L. J. Q. B. 274; 45 L. T. 242; 30 W. R. 18; *Robshaw v. Smith* (1878), 38 L. T. 423; and Part VII. Chap. 3.

CHAPTER X.

INSPECTION AND PROOF IN LEGAL PROCEEDINGS.

Disclosure of Account Compulsory.

THE state of a customer's account is not protected from disclosure in legal proceedings. Neither the customer nor the banker has any legal privilege in this respect.

In *Loyd v. Freshfield* (a) a banker's clerk was asked what was the balance on a given day of a customer who was a party to the cause. The witness said that their orders were not to state what the balance of any customer was, except by the direction of the judge. Lord Chief Justice Abbott thereupon said: "It is not a confidential communication; I think you are bound to answer the question."

BANKERS' BOOKS EVIDENCE ACT.

Admissibility of Copies.

In order to avoid the inconvenience attending the production of bankers' books in Court, the Bankers' Books Evidence Act, 1879 (b), has rendered copies of the entries therein admissible in evidence, subject to certain conditions and limitations. This Act provides as follows:—

3. Subject to the provisions of this Act, a copy of any entry in a banker's book shall in all legal proceedings be received as *primâ facie* evidence of such entry, and of the matters, transactions and accounts therein recorded.

(a) (1826), 2 C. & P. 325, at p. 329.

(b) 42 Vict. c. 11. Sect. 1 provides that the Act may be cited thus. Sect. 2

of the Act was repealed by the Statute Law Revision Act, 1894.

4. A copy of an entry in a banker's book shall not be received in evidence under this Act unless it be first proved that the book was at the time of the making of the entry one of the ordinary books of the bank, and that the entry was made in the usual and ordinary course of business, and that the book is in the custody or control of the bank.

Such proof may be given by a partner or officer of the bank, and may be given orally or by an affidavit sworn before any commissioner or person authorized to take affidavits.

5. A copy of an entry in a banker's book shall not be received in evidence under this Act unless it be further proved that the copy has been examined with the original entry and is correct.

Such proof shall be given by some person who has examined the copy with the original entry, and may be given either orally or by an affidavit sworn before any commissioner or person authorized to take affidavits.

The Act not only renders copies of entries admissible where the entries themselves would formerly have been admissible: it makes copies admissible where the originals themselves would not have been. Before the Act entries were not, strictly speaking, evidence against a customer without proof that they had been recognised by him (*c*). But sect. 3 of the Act makes copies of entries in the books of a banker admissible evidence against anyone. Accordingly, copies of entries in the books of the bankers of a defendant are evidence against the plaintiff (*d*).

Privilege of Banker.

6. A banker or officer of a bank shall not, in any legal proceeding to which the bank is not a party, be compellable to produce any banker's book the contents of which can be proved under this Act, or to appear as a witness to prove the matters, transactions and accounts therein recorded, unless by order of a judge made for special cause.

This section only excuses the attendance of a banker with his books where he has complied with the provisions of sects. 2 to 5 (*e*).

(*c*) Per Cotton, L. J., in *Arnott v. Hayes* (1887), 36 Ch. D. 731, at p. 735.

(*d*) *Harding v. Williams* (1880), 14

Ch. D. 197.

(*e*) *Emmott v. Star Newspaper Co.* (1892), 62 L. J. Q. B. 77.

Inspection.

7. On the application of any party to a legal proceeding, a Court or judge (*f*) may order that such party be at liberty to inspect and take copies of any entries in a banker's book for any of the purposes of such proceedings. An order under this section may be made either with or without summoning the bank or any other party, and shall be served on the bank three clear days before the same is to be obeyed, unless the Court or judge otherwise directs.

It seems that under this Act, inspection of entries in a banker's books relating to an account kept in the name of a person not a party to the action can be ordered where the Court is satisfied that these entries will constitute material evidence against a party to the action (*g*).

But an order for inspection under this section will, as a general rule, be made only where they are entries in an account which is in form or substance the account of one of the parties to the litigation. If the Court has jurisdiction under the section to order inspection of the banking account of a person not concerned with the litigation, it will exercise that jurisdiction with the greatest caution (*h*), and will not make an order without notice to such person (*i*).

Referring to this section, Lindley, M. R., said: "What was meant was entries in an account which is in form or in substance the account of a party to the litigation. One of the parties may be an undisclosed principal, and an account kept at a bank in the name of a third party may be really his, and in such a case inspection might properly be ordered. But when an account is the account of a person who has nothing to do with the litigation, the Court ought to look to the effect in practice of such an order on the rights of third parties, and to take care that this section is not made a means of oppression. It may be that at the trial the

(*f*) Apparently these words mean the High Court or a judge thereof: see *Reg. v. Bradlaugh* (1883), 15 Cox, 217, at p. 222, note; 47 J. P. 243.

(*g*) *South Staffordshire Tramways Co. v.*

Ebbsmith, [1895] 2 Q. B. 669.

(*h*) *Pollock v. Garle*, [1898] 1 Ch. 1.

(*i*) *South Staffordshire Tramways Co. v.*

Ebbsmith, see note (*g*).

Court could order production of any account; but that is not the point with which we are dealing" (*k*).

But where, before the Act, a party had a right to issue a *subpoena duces tecum* to compel bankers to produce their books and be examined on their contents, he can now obtain an order for leave to inspect and take copies of the books. Thus, in *In re Marshfield, Marshfield v. Hutchings* (*l*), the plaintiff in an administration action was a residuary legatee of M., a solicitor, the testator in the action, and in the course of the cross-examination on the accounts in chambers of the defendant H., who was the testator's son-in-law and executor, and was carrying on business as a solicitor under the firm of "M. & H.," applied to the Court under sect. 7 that she, or her solicitor, who had been appointed receiver in the action, might be at liberty to inspect at the bankers' of the testator and the defendant the books of the bank for four years containing the entries of the accounts of the testator and also of M. & H., and to take copies of such entries. The plaintiff's solicitor deposed that the inspection was necessary for the purposes of the action. It was held that the plaintiff was entitled to the order asked for.

But the jurisdiction to order inspection of entries in bankers' books under the section will be exercised in conformity with the general law as to discovery by which a party to an action is entitled to refuse discovery of entries which he swears to be irrelevant. Accordingly, when a defendant states on affidavit that entries in his banking account are irrelevant to the matters in dispute in the action, and it does not appear from any other document before the Court that the affidavit is inaccurate, an order for inspection of those entries before the trial will not be made (*m*).

In *Parnell v. Wood* (*n*), which was an action for probate, the plaintiff had been ordered to produce for inspection documents in her possession relating to the matters in question in the action. She produced the pass-books of her banking account, sealing up parts of them which were, as she deposed, irrelevant to the matters in issue. Application was thereupon made by the opposite parties

(*k*) *Pollock v. Garle*, [1898] 1 Ch. 1, at p. 5. Cf. *Howard v. Beall* (1889), 23 Q. B. D. 1.

(*l*) (1886), 32 Ch. D. 499.

(*m*) *South Staffordshire Tramways Co. v. Ebbsmith*, [1895] 2 Q. B. 669.

(*n*) [1892] P. 137.

for an order authorizing them to inspect the books, or, in the alternative, for leave to issue a *subpœna duces tecum* to the officers of the bank for their production. This application was refused on the ground that there was nothing in the Bankers' Books Evidence Act to deprive a party to a legal proceeding of his right to refuse discovery of entries in his bankers' books on the ground that they were irrelevant, and that, whether the *subpœna duces tecum* should be granted was a matter which ought to be left for the determination of the judge at the trial.

Lord Justice Lindley said, in the course of his judgment: "I do not say that the Bankers' Books Evidence Act might not be resorted to before the trial in some cases—as, for instance, if the pass-books had been lost. . . . The Act was passed mainly for the relief of bankers, to avoid the serious inconvenience occasioned to them by their having to produce books which were in constant use in their business, and by having to send, for the purpose of verifying them, a clerk who would otherwise be employed at the time in making entries in those very books." And Lord Justice Kay added: "Sect. 7 of the Act gives a certain power of inspecting bankers' books if the judge thinks fit to order it, but to suppose that it meant to authorize a roving inspection of them is absurd. . . . A case must be made showing that such inspection is proper."

So, in *Emmott v. Star Newspaper Company* (o), which was an action for libel alleging the financial unsoundness of the plaintiff's position, the defendants pleaded justification, and took out a summons for an order under sect. 7 to inspect and take copies of the plaintiff's banking account in his bankers' books. It was held that the order was rightly refused.

But in *Perry v. Phosphor Bronze Co.* (p), where the plaintiff had made an affidavit of documents, to which he scheduled his bankers' pass-books, it was held that the defendant was not debarred from obtaining inspection under this section of the entries in the bankers' books, and *Parnell v. Wood* (q) was distinguished.

(o) (1892), 62 L. J. Q. B. 77.

(p) (1894), 71 L. T. 854; 14 R. 351.

(q) See p. 212, *supra*.

In a legal proceeding in England the Court has power under this section, on the application of any party to the proceeding, to order that such party shall be at liberty, for the purposes of such proceeding, to inspect and take copies of any entries in a banker's book in either of the other divisions of the United Kingdom (*r*).

Mode of Obtaining Order.—An order giving liberty to inspect a banker's books and take copies of any entries therein for the purposes of legal proceedings, may be made under the section, on the application of a party to such proceedings *ex parte* and without evidence. But it is generally better that notice of the application should be served on the person whose account it is desired to inspect. In some cases the Court may require evidence of the *bona fides* of the application, and of the materiality of the inspection (*s*).

The practice in the Chancery Division is to apply by summons to a Master. In the King's Bench Division the application is made on an affidavit of facts stating the nature of the proceeding, the necessity for the inspection and for the copies, and showing that the entries of which inspection is sought will be admissible in evidence at the trial, and indicating the period over which it is proposed that the inspection should extend (*t*). The Master may direct a summons to issue. If the Act is being used for the purpose of obtaining discovery, as distinguished from the obtaining of such evidence as the applicant would formerly have been entitled to obtain by *subpoena duces tecum* at the trial, a summons will be directed (*u*).

Costs.

8. The costs of any application to a Court or judge under or for the purposes of this Act, and the costs of anything done or to be done under an order of a Court or judge made under or for the purposes of this Act, shall be in the discretion of the Court or judge, who may order the same or any part thereof to be paid to any party by the bank, where the same have been

(*r*) *Kissuin v. Link*, [1896] 1 Q. B. 574.

(*t*) Annual Practice, 1904, p. 511.

(*s*) *Arnott v. Hayes* (1887), 36 Ch. D. (u) *Ibid.* p. 510.

occasioned by any default or delay on the part of the bank. Any such order against a bank may be enforced as if the bank was a party to the proceeding.

Application of Act.

9. In this Act the expressions "bank" and "banker" mean any person, persons, partnership, or company carrying on the business of bankers and having duly made a return to the Commissioners of Inland Revenue, and also any savings bank certified under the Acts relating to savings banks, and also any post office savings bank.

The fact of any such bank having duly made a return to the Commissioners of Inland Revenue may be proved in any legal proceeding by production of a copy of its return verified by the affidavit of a partner or officer of the bank, or by the production of a copy of a newspaper purporting to contain a copy of such return published by the Commissioners of Inland Revenue; the fact that any such savings bank is certified under the Acts relating to savings banks may be proved by an office or examined copy of its certificate; the fact that any such bank is a post office savings bank may be proved by a certificate purporting to be under the hand of Her Majesty's Postmaster-General or one of the secretaries of the Post Office.

Expressions in this Act relating to "bankers' books" include ledgers, day books, cash books, account books, and all other books used in the ordinary business of the bank.

The scope of the Act is extended by the Revenue, Friendly Societies, and National Debt Act, 1882 (*v*), s. 11 (2), which provides that—

The expressions "bank" and "bankers" in the Bankers' Books Evidence Act, 1879, shall include any company carrying on the business of bankers to which the provisions of the Companies Acts, 1862 to 1880, are applicable, and having duly furnished to the registrar of joint stock companies a list and summary with the addition specified by this Act (*w*), and the fact of such list and summary having been duly furnished may be proved in any legal proceedings by the certificate of the registrar or any assistant registrar for the time being of joint stock companies.

(*v*) 45 & 46 Vict. c. 72.

(*w*) See p. 28, *supra*.

Sect. 10 (of the Bankers' Books Evidence Act).—In this Act—

The expression "legal proceeding" means any civil or criminal proceeding or inquiry in which evidence is or may be given, and includes an arbitration ;

The expression "the Court" means the Court, judge, arbitrator, persons or person before whom a legal proceeding is held or taken ;

The expression "a judge" means with respect to England a judge of the High Court of Justice, and with respect to Scotland a lord ordinary of the Outer House of the Court of Session, and with respect to Ireland a judge of the High Court of Justice in Ireland.

The judge of a County Court may, with respect to any action in such Court, exercise the powers of a judge under this Act.

Computation of Time.

11. Sunday, Christmas Day, Good Friday, and any bank holiday shall be excluded from the computation of time under this Act.

Notice to Produce.

As to production in pursuance of a notice to produce served in an action to which the banker is a party, reference should be made to Ord. XXXI. rr. 17 and 18, of the Rules of the Supreme Court.

Books of the Bank of England.

Apart from the Act discussed above, an entry in the books of the Bank of England may be proved by secondary evidence. For example, a witness who has inspected an entry therein may orally testify to what he has seen, or an examined copy may be used (x).

In a case where a bill had been filed for a discovery of stock standing in the name of the plaintiff's late father, either alone or jointly, for twenty years before and at his death, and for an inspection of the Bank books containing the entries of such stock, it was held that the Bank ought to set forth a list of the books containing the entries (y).

(x) *Mortimer v. M'Callan* (1840), 6 M. & W. 58.

(y) *Heslop v. Bank of England* (1833), 6 Sim. 192.

In *Foster v. Bank of England* (z) the plaintiff, having been a holder of Three-and-a-Half per Cent. Stock, brought an action against the Bank of England for refusing to pay the dividends. The defendants pleaded denying that the plaintiff was the proprietor of the stock, and their defence in fact was that, before the dividends became due, the stock had been transferred out of the plaintiff's name. Issue being joined and notice of trial given, the Court, on motion, made an order that the plaintiff should be at liberty to inspect that particular entry in the transfer book at the Bank which related to the transfer of the stock in question, but not any other part of the Bank books.

Evidence in Winding-up Proceedings.

The Companies Act, 1862, provides—

115. The Court may, after it has made an order for winding up the company, summon before it any officer of the company or person known or suspected to have in his possession any of the estate or effects of the company, or supposed to be indebted to the company, or any person whom the Court may deem capable of giving information concerning the trade, dealings, estate, or effects of the company; and the Court may require any such officer or person to produce any books, papers, deeds, writings, or other documents in his custody or power relating to the company; and if any person so summoned, after being tendered a reasonable sum for his expenses, refuses to come before the Court at the time appointed, having no lawful impediment (made known to the Court at the time of its sitting, and allowed by it), the Court may cause such person to be apprehended and brought before the Court for examination. Nevertheless, in cases where any person claims any lien on papers, deeds, or writings or documents produced by him, such production shall be without prejudice to such lien, and the Court shall have jurisdiction in the winding-up to determine all questions relating to such lien (a).

117. The Court may examine upon oath, either by word of mouth or upon written interrogatories, any person appearing or brought before them in manner aforesaid concerning the affairs,

(z) (1846), 8 Q. B. 689.

(a) See also sect. 100 of the Act, cited at p. 231, *infra*.

dealings, estate, or effects of the company, and may reduce into writing the answers of every such person, and require him to subscribe the same (b).

In *In re The Financial Insurance Company, Bloxam's Case* (c), in the course of the proceedings in the winding-up of the company, the official liquidator, under the above sect. 115, summoned before him a brother of a contributory, who was the managing clerk of a bank in which the contributory had an account. When questioned as to the nature of that account the clerk declined to answer; but Vice-Chancellor Stuart held that he was bound to do so.

In *In re Smith, Knight & Co.* (d), shares in a company which was being wound up had been transferred from C. to N. without consideration, G. being the active party in the transaction. The subsequent calls had been paid with moneys supplied by him. The liquidator, deeming it material to trace these moneys, applied for a summons under sect. 115, calling upon the secretary of the banking company with whom G. kept his account to attend for examination and produce all books containing entries as to G.'s affairs. Upon the application, which was, of course, *ex parte*, Lord Justice Selwyn said: "It appears to me that the proposed summons may properly be issued; but I say nothing to fetter the judgment of the Master of the Rolls" (before whom the winding-up was proceeding) "as to any objection which the party summoned, when he attends for examination, may make as to the inspection of the books, and it is left quite open to the witness to make any such objection." Lord Justice Giffard added: "I am of the same opinion. It appears to me that, under the 115th section, the person summoned is in the same position as an ordinary witness served with a *subpoena duces tecum*."

In *In re Contract Corporation, Druitt's Case* (e), an application under the section was made on behalf of the official liquidator of the company to compel the manager of the Charing Cross branch of the Union Bank of London to attend for examination, and to produce any documents relating to the banking account of John

(b) See also Companies (Winding-up) Act, 1890, s. 8.

(c) (1867), 36 L. J. Ch. 687.

(d) (1869), 4 Ch. 421.

(e) (1872), 14 Eq. 6; *sub nom. Forbes' Case*, 41 L. J. Ch. 467.)

Forbes, who was a contributory of the company. It appeared that Forbes had closed his account before the manager was summoned. The latter having, in the first instance, refused to be sworn or examined, Lord Romilly, M. R., said: "This is just one of those cases for which the 115th section of the Act was intended to provide. An order must be made for the attendance of the manager, and for the production of the books (*f*) and papers required so far as they relate to Forbes' account; but he is not bound to disclose anything that may affect any other account" (*g*).

(*f*) This must now be taken subject to the provisions of the Bankers' Books Evidence Act.

(*g*) See also *In re North Australian Territory Co.* (1890), 45 Ch. D. 87; *In re London and Northern Bank, Archer's Case*, W. N. (1901) 236, 247.

CHAPTER XI.

CLOSING THE ACCOUNT.

Determining Events.

THE account will be closed, either permanently or temporarily, as the case may be, in any of the following events:—

1. On notice given by either party to the other of intention to close the account.
2. On the death of the customer (*a*).
3. On notice received by the banker of the insanity of the customer (*b*).
4. On notice received by the banker of an available act of bankruptcy committed by the customer (*c*).
5. In the case of a company customer, the making of a winding-up order (*d*).
6. A garnishee or other order of the Court made upon the banker (*e*).
7. On notice received by the banker of an assignment made by the customer of, or comprising, his credit balance (*f*).
8. The bankruptcy or winding-up of the banking firm or company (*g*).

Notice.

A banker will not be justified in closing an account and dishonouring cheques drawn against it without reasonable notice. The

(*a*) See Part III. Chap. 9.

(*b*) See p. 230, *infra*.

(*c*) See p. 230, *infra*.

(*d*) Companies Act, 1862, s. 153. See

also sects. 92, 95 and 151 of this Act.

(*e*) See Part III. Chap. 9.

(*f*) See p. 231, *infra*.

(*g*) See pp. 20, 38, *supra*.

notice must be sufficient to enable the customer, having regard to outstanding cheques or bills, to make such arrangements as will obviate injury to his credit (*h*).

From the nature of the case there is no similar limitation upon the right of the customer to close the account.

Whether an intimation amounting to a notice of intention to close an account has been given may in some cases involve a question of fact or of construction.

In *Berry v. Halifax Commercial Banking Company* (*i*) a customer of a bank had mortgaged to the bank a policy of assurance on his life to secure the amount from time to time owing by him to the bank in account current. The mortgage provided that the statutory power of sale should be exercisable by the bank if (among other events) default should be made in payment of the balance owing for the space of one calendar month after the account current had been closed. On November 9th, 1899, the customer wrote to the bank manager: "There was a meeting of creditors yesterday. . . . They agreed to accept all the assets I had. I gave them to understand that I was insured . . . and that you held the policy . . . as security for your account. . . . There was a trustee appointed. Trusting everyone will get 20s. in the pound," &c. On December 18th the bank sold the policy under the power in the mortgage. It was held that the letter amounted to a closing of the account, and that the bank were justified in realizing their security.

In the course of his judgment, Mr. Justice Kekewich said: "I think that the reference to closing 'by the death of the mortgagor' disposes of the argument adduced on behalf of the plaintiff that it must be by some act necessarily communicated by the mortgagee to the mortgagor. I am far from intending to hold that in a large number of cases of closing an account—probably the large majority—it would not be necessary to give some notice; but I think that that phrase goes to show that the parties contemplated and intended that an account might be closed in other ways than by a simple

(*h*) See the summing-up of Mathew, J., in *Buckingham v. London and Midland Bank* (1895), 12 T. L. R. 70; *Agra and Masterman's Bank, Limited v. Hoffman*

(1864), 34 L. J. Ch. 285; *Cumming v. Shand*, cited at p. 191, *supra*.

(*i*) [1901] 1 Ch. 188.

closing of the account on the part of the bank, by drawing a line, balancing the account, and communicating that to the mortgagor. That leaves it to me to consider what, according to the course of dealing, according to mercantile custom, and according to special contract, would be a closing of the account." His Lordship referred to the facts, and, with regard to certain correspondence between the parties, said that, though there was pressure by the bank, sometimes severe, he could not find anywhere a distinct peremptory intimation that the account would be closed, either in so many words, or to that effect, if something was not done by the customer before a certain date. Later on he observed: "I now come to what I think did amount to a closing of the account under the mortgage, namely, the letter of November 9th. The bank, of course, were included in the persons who it was hoped would get 20s. in the pound. The bank were secured creditors, and the writer refers to the security which they had. He addresses them as secured creditors, and as regards that I do not see the importance of the fact that the account was in debit and not in credit. The bank held security, and Smithies' interest in that security had passed to his trustee. If that letter means anything, it surely means that there is an end of the transactions between the parties. It comes to this: 'Our transactions up to the present time have been of this character. I have been drawing on my current account in excess of the moneys which I have from time to time paid in, but you have held security and you hold security still: those are the relative positions. That has come to an end. I have now assigned everything, including the security, subject to your charge, to a gentleman whose name I forget; the creditors have accepted what I can give them as a discharge of my debts to them, and the result is that you and I now have severed our connection of banker and customer.' I cannot conceive that this letter, if it was not intended to mean that, was intended to mean anything at all. . . . The relation of banker and customer here was at an end. There was no relation of banker and customer in the ordinary sense of an unsecured account, where the customer paid in money and drew it out by cheques. It was a peculiar relation constituted by that deed, and that obviously had come to an end. It seems to me that the mortgagor closed the account

himself, or, if he did not actually close it, he recognised that it must be closed. There was nothing more to be done. It was said that the bank after that might have honoured his cheques. They might, of course, but one must not suppose such a foolish thing as that. It is absurd to suppose that after that letter they would have honoured his cheques, and that is really the only way in which the account could be kept open. It seems to me that on November 9th there was an end of the whole transaction, and the power of sale arose or was exercisable within a month of that date."

Right to the Credit Balance.

The Normal Position.—In ordinary cases of the closing of an account by notice or by death, the customer or his duly appointed representatives will, of course, be entitled to be paid the amount of a credit balance. No other person will be able to maintain any claim against the banker in respect of it, unless he can show that the balance represents trust moneys to which he is entitled, or—which it would be difficult to do—that the customer was in reality acting as his agent in the matter of the account.

The position as regards trust moneys has been sufficiently treated in Chapters 3 and 4 of this Part. Claims by third parties upon other grounds are illustrated by the following cases.

In *Sims v. Bond* (k) Charles Gribble, the managing owner of the ship "Princess Charlotte," had been permitted by the other owners to have the possession of two warrants of the East India Company whereby the cashiers of the Bank of England were ordered to pay to the owners of the vessel or to the bearer the sum thereon mentioned for freight. The managing owner deposited these warrants in the hands of his bankers, and they received the money due on them, and gave him credit for it in account. In an action brought after his death by the surviving part-owners against the bankers, it was held that they could not recover the money, because it was not shown that the loan to the bankers was upon their account.

Lord Chief Justice Denman, in delivering the judgment of the

(k) (1833), 5 B. & Ad. 389, 392.

Court of King's Bench, said: "Sums which are paid to the credit of a customer with a banker, though usually called deposits, are, in truth, loans by the customer to the banker (*Carr v. Carr* (l); *Devaynes v. Noble* (m)); and the plaintiffs, who seek to recover the balance of such an account, must prove that the loans were made by them. . . . Where a contract not under seal is made with an agent, in his own name, for an undisclosed principal, either the agent or the principal may sue upon it, the defendant in the latter case being entitled to be placed in the same situation, at the time of the disclosure of the real principal, as if the agent had been the contracting party. . . . But where money is lent by another in his own name, the plaintiff who alleges that he was in reality the lender, must prove that fact distinctly and clearly. He must show that the loan, though nominally that of another, was really intended to be his own. It was incumbent, therefore, in this case, upon the plaintiffs to prove that, when Charles Gribble lent the proceeds of the freight warrants to the defendants and had them placed to his credit in an account kept in his own name, he was acting in that respect as the agent of the plaintiffs, as well as on his own account, and really lending the money to the defendants on the plaintiffs' account as well as his own. In this the plaintiffs certainly failed. . . . Indeed, it would be very difficult for the plaintiffs to prove that they were the real lenders; for if they had intended to be so, it is natural to suppose that they would have taken care to raise the account in the defendants' books in their own names, or in the name of the 'owners of the ship Princess Charlotte.'"

In *Tassell v. Cooper* (n) the plaintiff, who had been the farm bailiff of Lord De L'Isle, after his employment in that capacity had ceased or been modified, received a cheque for 1c0l. in payment for wheat which he had sold on Lord De L'Isle's account while acting as bailiff. This cheque he paid in to his own account with his bankers, who received the cash for it and gave him credit for the amount. Subsequently Lord De L'Isle wrote to the bankers asking them to hold in their hands until further correspondence the

(l) (1811), 1 Meriv. 541, note.

(m) (1816), *Ibid.* 529, at p. 568.

(n) (1850), 9 C. B. 509.

balance of 128*l.* on credit of the plaintiff's account, it being money belonging to him, and he engaged to hold the bank harmless for so doing. In consequence of this notice, the bank dishonoured the plaintiff's cheques. It was held by the Court of Common Pleas that, even assuming that the cheque had been improperly obtained by the plaintiff, nevertheless as between him and his bankers the amount was recoverable by him as money had and received by them to his use or money paid.

"It seems to me," said Mr. Justice Maule, "that the banking company, having received the money on behalf of the plaintiff and given him credit for it, became debtors to him for the amount, and that the circumstance that the receipt of the cheque by the plaintiff might have been blameable does not afford any answer to this action. The transaction was regular and lawful so far as the plaintiff and the bankers were concerned: it was a simple transaction of loan; and consequently I think the plaintiff is entitled to recover" (o).

In *Pinto v. Santos* (p) a banker had received a sum of money belonging to several persons from their agent, who was charged to divide it amongst them in distinct proportions known to the banker. Part of the money had been drawn out and distributed by the agent in proportions unknown to the banker, and the agent had afterwards given notice to the banker not to pay over the residue to anyone without his order, his own authority having been revoked by his principals. It was held that the banker was not bound to pay over to any of the principals his share of the fund upon his individual demand.

Of course, in such a case the banker would be liable to account for the money if proper proceedings were instituted.

The case of *Culland v. Loyd* (q) appears to be against the current of authority, and somewhat difficult to explain. There A., who had received a sum of money bequeathed by will to his wife, gave it to her to take care of. She, without his knowledge, deposited it in a bank in the name of R. Birch, her son by a former marriage,

(o) Cf. *Summers v. City Bank* (1874), 9 C. P. 580; and per Farwell, J., in *Jacobs v. Morris*, [1901] 1 Ch. 261, at pp. 269, 270; [1902] 1 Ch. 816.

(p) (1814), 5 Taun. 447; 1 Marsh. 132.

(q) (1840), 6 M. & W. 26.

who was then about twelve years of age, and took from the bankers an accountable receipt in her son's name, bearing interest. The plaintiff, having discovered the deposit, demanded the money from the defendants; and, on their refusal to pay it, brought an action for money had and received. It was held that the bankers were liable to A. for the amount.

Lord Abinger, C. B., upon the argument of a rule, said: "There is no doubt that if I pay money to A., who pays it to his banker to his own account, without notice, I cannot recover it from the banker; and for some time I doubted whether there was not in this case a lawful contract to bind the defendants. . . . The question is, whether the bankers, when the plaintiff has given them notice that it is his money, have a right to set up the *jus tertii*. The answer is that there is no *jus tertii*: it is admitted that the money is the plaintiff's, and the defendants are merely setting up an unlawful title in answer. . . . The case set up for the defendants is answered by this, that there is no contract to bind them. The wife was not the agent of her husband, nor had she any right to make a deposit for the infant, who could give her no authority. It is preposterous to suppose that, although the son can have no right to receive the money when he comes of age, nor can draw a cheque in the meantime, yet the bankers have a right to keep it from the true owner for nine years."

Baron Alderson added: "If the money had been received by the defendants under a contract, I am not prepared to say that the plaintiff could recover; but, in truth, there is no contract with the defendants on behalf of Birch."

It is conceived that if a similar action were now to come before the Courts, this case would be distinguished, or, at all events, that the decision would be based upon somewhat different grounds.

After Fictitious Transactions.—In *British and American Telegraph Company v. Albion Bank* (r) the plaintiffs, a telegraph company, invited applications for shares, received some in the ordinary way and allotted some, on which deposits were paid. The number allotted was, however, insufficient to procure a settling day on the Stock Exchange, and some of the directors of the com-

(r) (1872), L. R. 7 Ex. 119.

pany, S., the promoter, and C., the defendants' manager, agreed, in order that the defendants might certify to the committee of the Stock Exchange that the requisite amount of shares had been subscribed, that an account should be opened in S.'s name with the defendants, and another account in the plaintiffs' name; that the plaintiffs should guarantee to the defendants the repayment of any money drawn by S., and charge with such repayment any balance in their favour; that the defendants should have a bonus of 600*l.*, and C. of 1,000*l.*; that S. should get persons to apply for shares, which should be duly allotted, and should draw on his account for, and pay into the plaintiffs' account the requisite deposits, taking blank transfers from the pretended allottees. This plan was carried out. Accounts were opened: that in the plaintiffs' name with 1,500*l.* really paid in; that in S.'s name with a loan of 1,500*l.* from the defendants. Sham applicants were obtained by S., and shares allotted to them. S. thereupon drew on his account, and with the proceeds paid the requisite deposits into the plaintiffs' account. The pretended allottees, immediately after the shares were allotted, handed blank transfers to S. Finally, the plaintiffs' account with the defendants stood with a credit of 24,505*l.* 18*s.* 6*d.*, made up of the 1,500*l.* really paid in and the pretended deposits. S.'s account stood with a debit of 24,506*l.* 8*s.* 4*d.*, made up of the sums he had drawn and the 1,500*l.* loan. No settling day was ever granted, and the plaintiffs afterwards went into liquidation under a winding-up order. In an action by the plaintiffs to recover the whole amount to their credit, the defendants paid their bonus of 600*l.* into Court, and denied liability as to the residue. It was held that the plaintiffs were entitled to the 1,500*l.* actually paid by them to the defendants, but to no more, and that judgment must therefore be given for them for 900*l.* (*s*).

Account of Married Woman.—In the absence of special reason to the contrary, the banker should treat moneys standing in the name of a wife in the same way as he would those in the name of a man (*t*).

(*s*) Cf. *Gray v. Lewis* (1873), 8 Ch. 1035, at pp. 1052, 1055.

(*t*) See *Married Women's Property Act*, 1882 (45 & 46 Vict. c. 75), ss. 6, 7.—

As to the determination in a summary way of questions between husband and wife with regard to property, see sect. 17 of that Act. See also p. 136, *supra*.

Account in Joint Names of Spouses.—In *Marshal v. Crutwell* (u) the husband of the plaintiff, being in failing health, transferred his banking account from his own name into the joint names of himself and his wife, and directed the bankers to honour cheques drawn either by himself or his wife; and he afterwards paid in considerable sums to this account. All cheques were afterwards drawn by the plaintiff at the direction of her husband, and the proceeds were applied in payment of household and other expenses. The husband never explained to the plaintiff what his intention was in transferring the account, but he was stated by the bank manager to have remarked at the time of the transfer that the balance of the account would belong to the survivor of himself and his wife. After the death of her husband (which took place a few months after the transfer) the plaintiff claimed to be entitled to the balance. It was held that the transfer of the account was not intended to be a provision for the plaintiff, but merely a mode of conveniently managing her husband's affairs; and, consequently, that she was not entitled.

In the course of his judgment, Sir George Jessel, M. R., said: "The husband, being in failing health, goes to the bank and says, 'Change the account from my own name into the name of myself and my wife, and I authorize you to honour the cheques of either of us.' The bank manager says (but I cannot rely on loose conversations, of which he has evidently no specific recollection) that he said also, 'The balance of the account will belong to the survivor.' Whether he said so or not I think is not very material, because the word 'belong' is an ambiguous word, and no real conclusion can be drawn from that. . . . Looking at the fact that subsequent sums are paid in from time to time, and taking into view all the circumstances . . . I think the circumstances show that this was a mere arrangement for convenience, and that it was not intended to be a provision for the wife in the event which might happen, that at the husband's death there might be a fund standing to the credit of the banking account. I take into account the circumstance that the wife could draw upon the fund in the husband's lifetime, so that it would not necessarily be a

(u) (1875), 20 Eq. 328.

provision for her after his death, and also the circumstance that the amount of the fund at his death must be altogether uncertain; and having regard to the rule which is now binding on me, that I must infer from the surrounding circumstances what the nature of the transaction was, I come to the conclusion that it was not intended to be a provision for the wife, but simply a mode of conveniently managing the testator's affairs, and that it leaves the money therefore still his property."

On the other hand, in *Williams v. Davies* (v), where it appeared that money had been deposited in a bank in the joint names of the depositor and his wife by way of provision for the latter in the event of her surviving him, it was held that the fund was the absolute property of the wife on her surviving him.

Partnership and other Joint Accounts.—These are dealt with in Part III. Chap. 6, and Part VIII. Chap. 3.

Position on Customer's Death.—The probate or letters of administration will indicate the person with whom the banker has to settle upon the death of his customer.

Payment to one of several co-executors (w) or co-administrators (x) will discharge the banker.

The 20 & 21 Vict. c. 77, provides—

77. Where any probate or administration is revoked under this Act, all payments *bond fide* made to any executor or administrator under such probate or administration, before the revocation thereof, shall be a legal discharge to the person making the same; and the executor or administrator who shall have acted under any such revoked probate or administration may retain and reimburse himself in respect of any payments made by him which the person to whom probate or administration shall be afterwards granted might have lawfully made.

78. All persons and corporations making or permitting to be made any payment or transfer *bond fide*, upon any probate or letters of administration granted in respect of the estate of any deceased person under the authority of this Act, shall be indem-

(v) (1864), 33 L. J. P. 127.

(w) *Can v. Read* (1749), 3 Atk. 695; *Simpson v. Gutteridge* (1816), 1 Madd. 609, 616; *Sneesty v. Thorne* (1855), 1 Jur. N. S. 1058; 7 De G. M. & G. 399;

Conveyancing Act, 1881, s. 30 (1).

(x) *Willand v. Fenn*, cited in *Jacob v. Harwood* (1751), 2 Ves. sen. 265. Secus as to trustees: see cases cited in last note.

nified and protected in so doing, notwithstanding any defect or circumstance whatsoever affecting the validity of such probate or letters of administration (*y*).

In *Tarn v. Commercial Bank of Sydney* (*z*) a testatrix, having indorsed and delivered a bill of exchange to her bankers for collection at maturity, died before the bill became due, and her executors, before probate of the will was granted, sued the bankers for a return of the bill or its value. The defendants were always willing to pay over the proceeds of the bill to the plaintiffs upon production of probate. It was held that all proceedings in the action ought to be stayed until the plaintiffs obtained probate.

"Bankers," said Stephen, J., "are in a peculiar position; and when asked to hand over large sums of money to persons claiming as executors of a deceased customer, I think they are justified in requiring to be made safe by production of probate."

A bequest of "ready money" (*a*), or of "money due at the testator's decease" (*b*), or of "property at a bank" (*c*), or of "all moneys" (*d*), or the like, may pass the balance standing to the credit of the testator at the time of his death. But a bequest of "securities for money" will not pass such balance (*e*).

Notice of Insanity.—On receiving convincing proof of the insanity of a customer, it would appear that the only safe course for the banker is to refrain from making any payments on the account until he receives an order from the Court or proof of his customer's recovery (*f*).

Bankruptcy.—After notice of an available act of bankruptcy committed by a customer, the banker should cease to honour his

(*y*) Cf. *Allen v. Dundas* (1789), 3 T. R. 125.

(*z*) (1884), 12 Q. B. D. 294.

(*a*) *Parker v. Marchant* (1842), 1 Y. & C. C. 290; and, on appeal, 1 Ph. 356; *Fryer v. Ranken* (1840), 11 Sim. 55; *Stein v. Rithendon* (1868), 37 L. J. Ch. 369; *Mayne v. Mayne* (1897), 1 Ir. 324. Cf. *Smith v. Butler* (1846), 3 J. & L. 565; *De Roebeck v. Lord Cloncurry* (1871), 5 Ir. R. E. 588.

(*b*) *Carr v. Carr* (1811), 1 Mer. 541, note.

(*c*) *In re Prater, Desinge v. Beare* (1888), 37 Ch. D. 481.

(*d*) *Manning v. Purcell* (1855), 7 De G. M. & G. 55.

(*e*) *Faisey v. Reynolds* (1828), 5 Russ. 12; *Hopkins v. Abbott* (1875), 19 Eq. 222.

(*f*) Cf. the judgments in *Drew v. Nunn* (1879), 4 Q. B. D. 661.

cheques (g). When the customer is made bankrupt the banker must settle with his trustee (h).

Winding-up.—In connection with this subject reference should be made to pages 38—41.

The banker may receive a notice from the liquidator in accordance with the following provisions.

The Companies Act, 1862:

100. The Court may, at any time after making an order for winding up a company, require any contributory for the time being settled on the list of contributories, trustee, receiver, banker, or agent, or officer of the company to pay, deliver, convey, surrender, or transfer forthwith, or within such time as the Court directs, to or into the hands of the official liquidator, any sum or balance, books, papers, estate, or effects which happen to be in his hands for the time being, and to which the company is *primâ facie* entitled (i).

The Companies (Winding-up) Rules, 1903, provide—

79. The powers conferred on the Court by section 100 of the Companies Act, 1862, shall be exercised by the liquidator. Any contributory for the time being on the list of contributories, trustee, receiver, banker, or agent or officer of a company which is being wound up under order of the Court shall, on notice from the liquidator and within such time as he shall by notice in writing require, pay, deliver, convey, surrender, or transfer to or into the hands of the liquidator any sum of money or balance, books, papers, estate, or effects which happen to be in his hands for the time being and to which the company is *primâ facie* entitled (j).

Order of the Court.—The banker may be served with an order relating to the balance standing to the credit of his customer, which must of course be strictly obeyed. This subject is dealt with in Part III. Chap. 9.

Notice of Assignment by Customer.—A notice from a third party

(g) See Bankruptcy Act, 1883, ss. 9, 49, 168.

(h) See *Ex parte Ward*, cited at p. 136, *supra*.

(i) See also sects. 115 and 133 of this

Act; Companies (Winding-up) Act, 1890, ss. 8, 10, 13; *In re National Bank* (1879), 10 Eq. 298.

(j) See Form 41 in the Appendix to these Rules.

that a customer has assigned to him his balance must be respected by the banker (*k*).

In *Walker v. Bradford Old Bank* (*l*), by a deed of assignment, all moneys then or thereafter to be standing to the credit of the assignor at a bank were assigned to a trustee, on trust for the assignor for his life, and after his death on other trusts. At the date of the assignment the assignor's balance at the bank was 48*l.*, and at his death it was 217*l.* Notice of the assignment was not given to the bank until after the assignor's death. The trustee sued the bank to recover the balance of 217*l.*, and obtained judgment, the Court holding that the bank, being a stranger to the assignment, could not set up the defence that it was voluntary and therefore unenforceable; that the balance at the time of the assignor's death was a debt or legal chose in action within the meaning of sect. 25, sub-sect. 6, of the Judicature Act, 1873, and that notice after the death of the assignor was sufficient (*m*).

But the banker will be entitled to adjust the balance upon the principles ordinarily applicable at the time he receives the notice of assignment.

In *Roxburghe v. Cox* (*n*) K., an officer in the army, mortgaged to R., to secure 5,000*l.*, all moneys which should be realized by sale of his commission. In December, 1877, K. obtained leave to retire from the army, and his commission was valued at 3,000*l.*, which, on the 6th of December, 1877, was paid by the Paymaster-General to C. & Co., the army agents of the regiment, and was carried to the deposit account kept by C. & Co. with the Army Purchase Commissioners, there to remain till K.'s retirement was gazetted. K. kept an account current with C. & Co. as his bankers, which was overdrawn to the amount of 647*l.* K.'s retirement was gazetted on the evening of the 18th of December, and as soon as C. & Co.'s office opened on the 19th, R. gave them notice of his security. R. having claimed payment of the 3,000*l.*, C. & Co. claimed to retain out of it the 647*l.* It was held that, as soon as K.'s retirement was gazetted, the 3,000*l.* became money had and received by C. & Co. for his use, and for which he could have

(*k*) See Part VIII. Chap. 7, Sect. 7.

(*l*) (1884), 12 Q. B. D. 511.

(*m*) Cf. *Rożick v. Gandell* (1851), 1

De G. M. & G. 763; and *Crosskill v. Bower*, cited at p. 183, *supra*.

(*n*) (1881), 17 Ch. D. 520.

brought an action at law; that they had a right to set off the balance due to them against this demand; that this set-off was equally available against R., of whose security C. & Co. had no notice until after their right to set off had arisen; and that, therefore, independently of any question of banker's lien, C. & Co. were entitled to retain the 647*l*.

Set-Off.

"A set-off must be a cross-claim for a liquidated amount, and it can be pleaded only to a liquidated claim. Both the set-off and the claim to which it is pleaded must be mutual debts, both due from and to the same parties in the same right. A claim by a man personally cannot be set off against a claim made against him in his representative capacity. A claim against the estate of a man deceased cannot be set off against a debt due to him in his lifetime. . . . Whenever there were cross demands of such a nature that, if both had been recoverable at law, they would have been the subject of a set-off there, then, if either of the demands was a matter of equitable jurisdiction, a court of equity would enforce a set-off. This principle of equitable set-off has been extended in bankruptcy. Under the mutual credit sections of the various Bankruptcy Acts a claim for liquidated damages may be set off" (o).

A set-off still remains what it was before the Judicature Act, 1873. It is a defence *pro tanto* to the action. A counterclaim, on the other hand, is in the nature of a cross-action: it need not be connected with the plaintiff's claim or even of the same nature (p).

In *Pedder v. Mayor, &c. of Preston* (q) the defendant corporation, in addition to the ordinary functions of a corporation, performed those of managers of baths and wash-houses under the Baths and Wash-houses Act, 1846, and also those of a local board of health under the Public Health Act, 1848, and kept at the plaintiff's bank three separate accounts, corresponding to these three classes of transactions. At the time of the plaintiff's suspending payment,

(o) Annual Practice, 1904, pp. 281-2.

(p) Per Fry, J., in *Beddall v. Maitland* (1881), 17 Ch. D. 174, at p. 181. See also *McGowan v. Middleton* (1883),

11 Q. B. D. 464; Ord. XXI. r. 16 of the Rules of the Supreme Court.

(q) (1862), 31 L. J. C. P. 291.

there was due from the defendants on the account of the municipal affairs of the corporation a large sum of money, and there was due from the plaintiff to the defendants, in respect of the local board of health account, a similar sum. It was held that the defendants might set off these claims one against the other, inasmuch as, though the accounts were separate, the defendants were debtors in the one and creditors in the other, and in their ordinary capacity.

In *Bailey v. Finch* (r) a banking firm had stopped payment in July, 1870, and were at once adjudged bankrupt. At the time of the stoppage defendant had an account with the bank, which he had overdrawn about 300*l*. At the end of 1869 a Mrs. A. had died, appointing defendant sole executor of her will, and leaving a balance of about 600*l*. in the hands of the bank. This balance was at once transferred by the bank from the account of Mrs. A. to the account of defendant, "executor of the late Mrs. A." In the interval before the stoppage defendant had drawn out about 200*l*. of this account, and paid in about 100*l*., leaving a balance in defendant's favour of about 500*l*. The defendant was left sole residuary legatee by Mrs. A.'s will. There were several pecuniary legacies which defendant had paid at the date of the stoppage of the bank; but there was a sum of 800*l*. to be invested for the benefit of certain persons, and an annuity of 100*l*. charged on the real and personal estate; and at the date of the bankruptcy defendant had not specifically provided for these two bequests; but there were in the hands of defendant, besides the balance in the bank, other personal assets of the testatrix; and after providing for these bequests, there would have been a surplus of 1,900*l*., to which defendant was entitled as residuary legatee. The plaintiff, as trustee of the bankrupt's estate, having brought an action against defendant to recover the amount of his overdrawn account, defendant sought to set off the balance in his favour on the executorship account. It was held that the transfer of the balance of the deceased's account to the account of the defendant, as executor, was equivalent to defendant drawing out the whole amount and paying the same amount into a fresh account, and created a personal debt for money lent between defendant and the

(r) (1871), L. R. 7 Q. B. 34.

bank; that the effect of it being opened as an executorship account was to affect the bank with notice if there were any equities attaching to the fund; but that, under the circumstances, there were no such equities as to prevent defendant treating the balance as a fund to which he was beneficially as well as legally entitled; and that, consequently, defendant was entitled to set it against the plaintiff's claim.

Referring to this case in *Ex parte Morier, In re Willis, Percival & Co.* (s), James, L. J., said: "There all the learned Judges start with this . . . that really in point of law there was but one account, and there was no debt except upon taking the two accounts together. The mere fact of the two accounts being put on different pages of the ledger could have no more effect than if an account had gone over from one page of the bank's ledger to another, or than if a man, as a mere matter of account, had kept different accounts, such as a farm account, a colliery account, or a house account, merely for his own convenience for ascertaining how moneys came in and how they had been applied. There the Judges started with that. Then they arrived at the conclusion that, there being that legal (not equitable) right of set-off, but the right to put the one account against the other and say there is a legal debt, being the balance of the items on both sides, there was no sufficient notice of any equity to countervail the legal right. It is not necessary to consider how that case would have stood if there had been any claims made by other persons against the estate. That was the *ratio decidendi*, and that is all that it is necessary for us to deal with" (t).

In *Bailey v. Johnson* (u) the defendant having been adjudicated bankrupt on a debtor summons issued by a banking firm of H. and H., a trustee was appointed, who realized the estate, and paid the proceeds into the bank of H. and H. in pursuance of a resolution of creditors. The firm of H. and H. were afterwards adjudicated bankrupts, the sum paid in by the trustee then standing to his credit in their books. Afterwards the order adjudicating the defendant bankrupt was reversed on appeal, and no order was

(s) (1879), 12 Ch. D. 491, at p. 498.

(t) See also the remarks of Cotton, L. J., in the same case, at p. 501.

(u) (1871), L. R. 6 Ex. 279; 7 Ex. 263; explained in *Ex parte Morier, In re Willis, Percival & Co.*, see note (s), *supra*.

made under sect. 81 of the Bankruptcy Act, 1869, as to his property. In an action brought by the plaintiff, as trustee in the bankruptcy of H. and H., against the defendant to recover the amount of his debt to them, it was held that the defendant was entitled to set off the amount so paid into the bank by the trustee in his bankruptcy, on the ground that, by virtue of sect. 81 of the Bankruptcy Act, 1869, on the annulling of the bankruptcy the property reverted to the person who had been declared bankrupt, and became his as from the time when it was paid into the bank.

When a person has an account in his own name, and has another in the joint names of himself and a second person with the same banker, upon the bankruptcy of the latter the one account cannot be set off against the other, unless the person having the sole account is solely interested in the balance of the joint account, so that equity would have compelled the other person, without imposing any terms or directing any enquiry, to transfer the account into his name alone (*v*).

In *Watts v. Christie* (*w*) bankers had stopped payment, being indebted to A. on his separate account, and creditors of A. and B. on their joint account. A. assigned the balance due to him from the bank to the joint account of himself and B., and gave notice to the bankers to place such balance to the joint account. The bankers, however, did not comply with this direction. Afterwards the bankers became bankrupt. It was held that A. and B. were not entitled to set off the two debts.

If the assets of a deceased customer are the subject of administration proceedings, a debt which only accrues to the banker after his death—for example, upon a promissory note payable subsequently—cannot be set off against the claim of the representative to the balance of the banking account at the time of death. The amount of the balance must be paid, the banker being left to prove for his claim in the administration proceedings (*x*).

In *Cavendish v. Geaves* (*y*) bankers to whom a customer had

(*v*) *Ex parte Morier, In re Willis, Percival & Co.* (1879), 12 Ch. D. 491.

(*w*) (1849), 11 Beav. 546.

(*x*) *Newell v. National Provincial Bank*

of England (1876), 1 C. P. D. 496. Cf. *In re Gregson, Christison v. Bolam* (1887), 36 Ch. D. 223.

(*y*) (1857), 24 Beav. 163; 27 L. J. Ch. 314.

given a bond assigned it over to third parties, who gave no notice of the assignment. It was held that the customer's right of setting off moneys due to him from his bankers against the bond continued.

Sir John Romilly, M. R., took the opportunity of enunciating the principles of set-off applicable in the case of such a bond as between banker and customer, as follows:—

“If a customer borrow money from his bankers and give a bond to secure it, and afterwards, on the balance of his general banking account, a balance is due to the customer from the same bankers, who are the obligees of the bond, a right to set off the balance against the money due on the bond will exist both at law and in equity.

“If the firm were altered and the bond assigned by the original obligees to the new firm, and notice of that assignment given to the debtor, and if, after this, a balance were due to him from the new firm (the assignees of the bond), . . . the customer would, in equity, be entitled to set off the balance due to him against the bond debt due from him.

“If after the bond had been given it had been assigned to strangers, and no notice of that assignment had been given to the original debtor (the obligor of the bond), then his rights would remain the same. Thus, if the assignment had been made to the stranger before any alteration of the firm, then the right of set-off would still remain at law, where the obligees of the bond and the debtors on the general account would be the same persons, and in equity also, if the matter of account were brought here, as the assignees of the chose in action would be bound by the equities affecting their assignors.

“But if notice of that assignment had been given to the original debtor, no right of set-off would exist in this Court for the balance subsequently due by the bankers to the obligor; because the persons entitled to the bond would, as the obligor knew, be different persons from the debtors to him on the general account, with whom he had continued to deal.

“If the assignment of the bond had been made to the new firm, with notice to the obligor, they would, if debtors on the general

account, be liable to the same rights of set-off in equity as if they had been the obligees.

“If after the alteration of the firm and after the assignment of the bond to the new firm, with notice to the debtor or obligor of that assignment, an assignment had been made of the bond to strangers, and no notice of that second assignment given to the obligor, then the rights of set-off would still remain to him in equity as against the first assignees, of whose assignment he had notice, and the second assignees would in equity be bound by it, because . . . the assignees of the bond take it subject to all the equities which affect the assignors” (z).

(z) See also *Thomas v. Howell* (1874), 18 Eq. 198.

Part III.

THE CUSTOMER'S CHEQUES.

CHAPTER I.

THE BANKER'S POSITION.

THE characteristic feature of the legal status of a banker is the obligation under which he lies as the debtor of his customer to honour the cheques of the latter, provided they are legal. This obligation arises from an implied term of the contract entered into between the banker and the customer upon the opening of the account (*a*).

The scope of this obligation must be considered.

The Obligation to Honour Cheques.

A banker is under an obligation to his customer to honour his cheque if presented by a holder in its original form within a reasonable time of its date and before the banker has received a countermand of payment or notice of the customer's death, and if a sum not less than the amount for which it is drawn is standing to the credit of the customer on his current account with the banker, or, having regard to the agreement, or the course of business prevailing between them, ought to be so standing, and such sum is at the disposal of the customer.

(*a*) *Foley v. Hill* (1848), 2 H. L. C. 28; per Blackburn, J., in *Emanuel v. Roberts* (1868), 9 B. & S. 121; 17 L. T.

646. See also the cases referred to in Chap. 11 of this Part.

Cheques Chargeable to Customers.

A banker is entitled to charge his customer with the amount which he has paid—

- (a) in honouring a cheque which he was bound to honour;
 - (b) in honouring a cheque which he would have been bound to honour if a sufficient balance had been standing to his customer's credit, when there was not, in fact, such a balance;
 - (c) in good faith and in the ordinary course of business in reliance upon a forged indorsement purporting to be made by or under the authority of the person to whose order the cheque of his customer was payable;
 - (d) in consequence of the negligence of his customer, according to the apparent tenor of a cheque which has been fraudulently altered;
 - (e) in reliance upon a forged cheque, where the customer, after learning of the payment, has failed to notify the banker of the forgery until his chance of recovering from the forger has been prejudiced;
 - (f) where the payment has been ratified by his customer;
- and, probably, with the amount which he has paid—
- (g) in good faith and without negligence in reliance upon a cheque drawn, but not in fact issued, by his customer.

It will be observed that the right of the banker to charge his customer, although it arises out of his obligation to honour cheques, as correlative and necessarily incidental thereto, is more extensive in its scope.

Accordingly, upon the presentment of a document for payment as a cheque, the following considerations arise:—

1. Is it in form a cheque duly stamped?
2. Does it purport to bear a signature which the customer has instructed his banker to honour?
3. Is the signature genuine?
4. Has the cheque been altered since its issue?
5. Is the person who presents it the holder? In other words, if the cheque is payable to order, does it purport to be properly indorsed?

6. Has the banker notice of any defect in the title of the person who presents it?
7. Has the banker notice of (a) countermand of payment; (b) the death, insanity or bankruptcy of his customer, or, in the case of a company, of its winding-up; (c) the assignment of the balance; (d) an intended breach of trust; or (e) a garnishee or other order prohibiting payment?
8. What balance ought to be standing to the credit of his customer on the current account?

These matters will now be treated in detail.

CHAPTER II.

THE FORM OF CHEQUES.

Definition.

A CHEQUE is an unconditional order in writing drawn on a banker signed by the drawer, requiring the banker to pay on demand a sum certain in money to or to the order of a specified person or to bearer, and which does not order any act to be done in addition to the payment of money (*a*).

“**Unconditional.**”—If the draft runs, “Pay to John Styles the sum of fifty pounds provided the receipt form at foot hereof is duly signed, stamped and dated,” it will not be a cheque within the meaning of the Bills of Exchange Act (*b*).

“**In Writing.**”—Apparently the writing may be in pencil (*c*).

“**To Pay on Demand.**”—It will be in due form if expressed to be payable either on demand, or at sight, or on presentation, or if, as is generally the case, no time for payment is expressed (*d*).

It need not specify the place where it is drawn or the place where it is payable (*e*).

“**To or to the Order of a Specified Person or to Bearer.**”—A cheque is payable to bearer which is expressed to be so payable, or on

(*a*) Bills of Exchange Act, 1882, ss. 73 and 3. Cf. Lord Blackburn's judgment in *M'Lean v. Clydesdale Banking Co.* (1883), 9 A. C. 95, at pp. 106-7.

(*b*) *Bavins, Junr. & Sims v. London and South Western Bank*, [1900] 1 Q. B. 270, at p. 272, note (1). But it may be within sect. 17 of the Revenue

Act, 1883 (46 & 47 Vict. c. 55). See the last-mentioned case; and per Lord Lindley in *Capital and Counties Bank v. Gordon*, [1903] A. C. 240, at p. 250.

(*c*) *Geary v. Physic* (1826), 5 B. & C. 234.

(*d*) Bills of Exchange Act, s. 10.

(*e*) *Ibid.* s. 3 (4) (*c*).

which the only or last indorsement is an indorsement in blank (*f*).

If a cheque is not payable to bearer, the payee must be named or otherwise indicated with reasonable certainty (*g*).

A cheque may be drawn payable to or to the order of the drawer (*h*).

It may be made payable to two or more payees jointly, or in the alternative to one of two, or one or some of several payees, or to the holder of an office for the time being (*i*).

Where a cheque, either originally or by indorsement, is expressed to be payable to the order of a specified person, and not to him or his order, it is nevertheless payable to him or his order at his option (*k*).

A cheque is payable to order which is expressed to be so payable, or which is expressed to be payable to a particular person, and does not contain words prohibiting transfer or indicating an intention that it should not be transferable (*l*).

A cheque drawn "Pay to — order" is payable to the order of the drawer (*m*).

Where the payee is a fictitious or non-existing person, the cheque may be treated as payable to bearer (*n*).

Banker's Draft.—A banker's draft payable to order on demand addressed by a branch of a bank to another office of the same bank, and not crossed, is not a cheque within the meaning of sects. 60 and 82 of the Bills of Exchange Act, 1882, nor is it within sect. 17 of the Revenue Act, 1883; but it comes within sect. 19 of the Stamp Act, 1853 (*o*), which protects bankers *bonâ fide* paying such drafts to holders claiming under forged indorsements (*p*).

Crossings.

The Bills of Exchange Act provides—

76.—(1.) Where a cheque bears across its face an addition of—

(a) The words "and company" or any abbreviation thereof

(*f*) Bills of Exchange Act, s. 8 (3).

(*g*) *Ibid.* s. 7 (1).

(*h*) *Ibid.* s. 5 (1).

(*i*) *Ibid.* s. 7 (2).

(*k*) *Ibid.* s. 8 (5).

(*l*) *Ibid.* s. 8 (4).

(*m*) *Chamberlain v. Young*, [1893] 2 Q. B. 206.

(*n*) Bills of Exchange Act, s. 7 (3).

(*o*) 16 & 17 Vict. c. 59.

(*p*) *Capital and Counties Bank v. Gordon*, [1903] A. C. 240.

between two parallel transverse lines, either with or without the words "not negotiable"; or

- (b) Two parallel transverse lines simply, either with or without the words "not negotiable"; that addition constitutes a crossing, and the cheque is crossed generally.

(2.) Where a cheque bears across its face an addition of the name of a banker, either with or without the words "not negotiable," that addition constitutes a crossing, and the cheque is crossed specially and to that banker.

If the payee crosses a cheque made payable to his order to his account at a particular bank, the cheque will not be thereby rendered non-transferable. Thus, in *National Bank v. Silke* (q), where the defendant had drawn a cheque, payable to the order of M., for 450*l.*, and crossed it "Account of M., National Bank," and had given it to M., who indorsed it to the National Bank, it was held that the plaintiffs were entitled to recover upon the cheque (r).

77.—(1.) A cheque may be crossed generally or specially by the drawer.

(2.) Where a cheque is uncrossed, the holder (s) may cross it generally or specially.

(3.) Where a cheque is crossed generally, the holder may cross it specially.

(4.) Where a cheque is crossed generally or specially, the holder may add the words "not negotiable."

(5.) Where a cheque is crossed specially, the banker to whom it is crossed may again cross it specially to another banker for collection.

(6.) Where an uncrossed cheque or a cheque crossed generally is sent to a banker for collection, he may cross it specially to himself (t).

A crossing authorized by the foregoing provisions is a material part of the cheque. It is not lawful for any person to obliterate or, except as authorized by these provisions, to add to or alter the crossing (u).

(q) [1891] 1 Q. B. 435.

(r) See further upon this point, p. 248, *infra*.

(s) "Holder" means the payee or indorsee of a bill or note who is in possession of it, or the bearer thereof: Bills of Exchange Act, s. 2.

(t) See *Capital and Counties Bank v. Gordon*, [1903] A. C. 240, cited in Chap. 9 of Part V.

(u) Bills of Exchange Act, s. 78. As to the effect of a material alteration in a bill or cheque, see sect. 64 (1) of the Act, and Chap. 7 of this Part, and Chap. 5 of Part IV.

Dividend Warrants and other Drafts.—The provisions of the Bills of Exchange Act, 1882, as to crossed cheques (which are contained in sects. 76 to 82), apply to a warrant for payment of dividend (*x*). They also apply to any document issued by a customer of any banker, and intended to enable any person or body corporate to obtain payment from such banker of the sum mentioned in such document as if it were a cheque, but it is not thus rendered a negotiable instrument. For this purpose his Majesty's Paymaster-General, and the King's and Lord Treasurer's Remembrancer in Scotland, are deemed to be bankers, and the public officers drawing on them are deemed to be customers (*y*).

Nothing in the Bills of Exchange Act affects the validity of any usage relating to dividend warrants, or the indorsement thereof (*z*). Accordingly, the practice of paying such warrants on the indorsement of one of several joint payees is probably good in law.

Stamp.

A cheque as such requires a penny stamp (*a*), which may be either impressed or adhesive (*b*).

In the latter case, if the cheque is drawn in the United Kingdom, it should be cancelled by the drawer before he delivers it out of his hands, custody, or power (*c*). The banker, however, to whom an unstamped cheque is presented for payment may affix and cancel an adhesive stamp (*d*). No other person can effectively stamp it (*e*).

In the case of a cheque drawn out of the United Kingdom, a person into whose hands it comes in the United Kingdom before it is stamped must, before he presents it for payment, or indorses, transfers, or in any manner negotiates or pays it, affix thereto and

(*x*) Bills of Exchange Act, 1882, s. 95.

(*y*) The Revenue Act, 1883 (46 & 47 Vict. c. 55), s. 17. As to the construction of this section, see *Bavins, Junr. & Sims v. London and South Western Bank*, [1900] 1 Q. B. 270, at p. 272, note (1), cited in Part V. Chap. 9; and *Capital and Counties Bank v. Gordon*, [1903] A. C. 240, at p. 250.

(*z*) Sect. 97 (3) (d).

(*a*) Stamp Act, 1891 (54 & 55 Vict. c. 39), Schedule, "Bill of Exchange."

(*b*) *Ibid.* ss. 2, 34 (1).

(*c*) *Ibid.* s. 34 (1).

(*d*) *Ibid.* s. 38 (2).

(*e*) *Hobbs v. Cathie* (1890), 6 T. L. R. 292, decided upon the Act of 1870, which was similar in this respect to the Act of 1891.

cancel the proper adhesive stamp. If an adhesive stamp not duly cancelled is affixed at the time when it comes into the hands of any *bonâ fide* holder, the latter may cancel the stamp as if he were the person by whom it was affixed (*f*).

Post-dated Cheque.—A post-dated cheque, stamped as a cheque, may be sued upon after the date which it bears (*g*).

Exemptions.—The exemptions specified in the schedule to the Stamp Act, 1891, are set out in Chap. 6 of Part IV.

In addition to these, there are other cases of exemption which have been introduced by divers statutes, *e.g.*, a cheque upon a poor law account (*h*); a cheque upon an account kept by a trustee in bankruptcy for the purposes of the administration (*i*), or the account of a company which is being wound up by order of the Court under the Companies (Winding-up) Act, 1890 (*k*); a cheque drawn for the purpose of the Post Office by any officer thereof (*l*); a cheque drawn in pursuance of the Trustee Savings Bank Acts (*m*); a cheque given by or to a registered friendly society or branch in respect of money payable by virtue of its rules or the Friendly Societies Act, 1896 (*n*), or drawn by, or on behalf of, the society upon its banker (*o*); a cheque drawn by a registrar of a County Court upon his public banking account (*p*); a cheque drawn in pursuance of the Loan Societies Act, 1840 (*q*), or of the rules of a society constituted thereunder.

(*f*) Stamp Act, 1891, s. 35. See *In re Boyse, Crofton v. Crofton* (1886), 33 Ch. D. 612.

(*g*) *Royal Bank of Scotland v. Tottenham*, [1894] 2 Q. B. 715. See also *Bull v. O'Sullivan* (1871), L. R. 6 Q. B. 209; *Gatty v. Fry* (1877), 2 Ex. D. 265; *Hitchcock v. Edwards* (1889), 60 L. T. 636.

(*h*) Poor Law Amendment Act, 1834 (4 & 5 Will. 4, c. 76), s. 86.

(*i*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 144.

(*k*) Finance Act, 1895 (58 & 59 Vict.

c. 16), s. 16.

(*l*) Post Office (Land) Act, 1881 (44 & 45 Vict. c. 20), s. 5.

(*m*) Trustee Savings Bank Act, 1863 (26 & 27 Vict. c. 87), s. 50. See sects. 25, 26.

(*n*) 59 & 60 Vict. c. 25, s. 33.

(*o*) Circular issued by the Inland Revenue, dated 10th November, 1894, which is regarded by the Board as applicable to the exemption contained in the last-cited Act.

(*p*) *Ibid.*

(*q*) 3 & 4 Vict. c. 110, s. 14.

CHAPTER III.

THE NATURE AND OPERATION OF CHEQUES.

A CHEQUE is normally a negotiable instrument (*a*), whether payable to bearer or to order.

Cheques crossed "Not Negotiable."

The Bills of Exchange Act provides—

81. Where a person takes a crossed cheque which bears on it the words "not negotiable," he shall not have and shall not be capable of giving a better title to the cheque than that which the person from whom he took it had.

In the case of cheques thus crossed, the general rule of law applies that no one can give a better title to property than he himself has.

The object of the section "is to afford to the drawer or the holder (sect. 77) of a cheque who is desirous of transmitting it to another person as much protection as can reasonably be afforded to it against dishonesty or accidental miscarriage in the course of its transit, if he will only take the precaution to cross it, with the addition of the words 'not negotiable,' so as to make it difficult to get such cheque so crossed cashed until it reaches its destination" (*b*).

The cheque remains capable of transfer, but the rights of the owner are protected. If the cheque comes into the hands of one whose title is defective, as, for example, if he has stolen it, or obtained it by a fraudulently false pretence (*c*), a subsequent holder for value will be in no better position.

(*a*) Bills of Exchange Act, s. 8 (2); *M'Lean v. Clydesdale Banking Co.* (1883), 9 A. C. 95. As to the legal consequences of negotiability, see Part VIII. Chap. 7, Sect. 4.

(*b*) Per Lord Brampton in *Great Western Railway v. London and County Banking Co.*, [1901] A. C. 414, at p. 422.

(*c*) *Ibid.*

If the holder of such a cheque succeeds in cashing it, he gets no better title to the money than he had to the cheque itself (*d*).

"Suppose," says Mr. Chalmers (*e*), "a cheque payable to bearer and crossed 'not negotiable' is stolen. The thief gets a tradesman to cash it for him, and the tradesman gets the cheque paid on presentment through a banker. The banker who pays (*f*) and the banker who receives (*g*) the money for the tradesman are protected, but the tradesman would be liable to refund the money to the true owner, and, assuming payment of the cheque to have been stopped, he could not sue the drawer" (*h*).

Cheques not so Crossed.

Apparently a cheque, whether payable to bearer or to order, can be prevented from being negotiable only by being crossed in this way.

In *National Bank v. Silke* (*i*) Lord Justice Lindley said: "I am not satisfied that under that Act" (the Bills of Exchange Act) "a cheque payable to bearer or to order can be made not negotiable except under the provisions in sects. 76—82, as to crossed cheques. We need not now decide that point; for, assuming that it can, it is necessary in my opinion that very plain words to that effect should be used. It is most important that a cheque should not be an embarrassing document. I am not satisfied that any words other than the words 'not negotiable,' which are prescribed by the Act, will be sufficient to make such a cheque not negotiable. I will, however, assume, without deciding, that sect. 73 makes sect. 8 applicable to cheques. Sect. 8, sub-sect. 1, enacts that 'When a bill contains words prohibiting transfer, or indicating an intention that it should not be transferable, it is valid as between the parties thereto, but is not negotiable.' Then sub-sect. 4 says: 'A bill is payable to order which is expressed to be

(*d*) *Great Western Railway v. London and County Banking Co.*, [1901] A. C. 414.

(*e*) Bills of Exchange, 6th ed. p. 262.

(*f*) See s. 80 of the Act.

(*g*) See s. 82.

(*h*) See also *Fisher v. Roberts* (1890), 6 T. L. R. 354, cited in *Great Western Railway v. London and County Banking Co.*, see note (*d*), *supra*; *Pennington v. Crossley* (1897), 13 T. L. R. 513.

(*i*) [1891] 1 Q. B. 435, at pp. 438, 439.

so payable, or which is expressed to be payable to a particular person, and does not contain words prohibiting transfer or indicating an intention that it should not be transferable.' I will assume for the purposes of this case that under those provisions you can draw a bill expressed to be payable to order or to bearer, and yet make it not transferable, though I am disposed to think that you cannot; but if you can, there must be plain words prohibiting transfer or showing an intention that the bill shall not be transferable. Ambiguous words will not do. Now, do the words in the present case prohibit transfer of the cheque, or indicate an intention that it shall not be transferable? It cannot be contended that they prohibit transfer, and I do not think that they indicate an intention that the cheque should not be transferable. They amount to nothing more than a direction to the plaintiffs to carry the amount of the cheque to Moriarty's account when they have received it."

Lord Justice Fry added (*k*): "I am inclined to think that sect. 8 divides bills into three classes—bills not negotiable, bills payable to order, and bills payable to bearer; so that a bill payable to order must always be negotiable. But assuming that a bill payable to order can be made not negotiable under sect. 8, sub-sect. 1, I am clearly of opinion that the words used in the present case neither prohibit transfer nor indicate an intention that the cheque should not be transferable. Much more definite words must be used to counteract the effect of the cheque being expressed to be payable to order" (*l*).

Cheque not an Assignment.

A cheque is an order to pay money directed to a banker, and nothing more. It is not an assignment of money in the hands of the banker, or of a debt or chose in action. Accordingly, the payee has no right of action against the banker if the cheque is dishonoured (*m*).

(*k*) At pp. 439, 440 of the report.

(*l*) In *Glen v. Semple* (1901), 3 Fras. Sess. Cas. 1134, it was held that the words "against cheque" appearing

upon a cheque had no effect upon its negotiability.

(*m*) Bills of Exchange Act, s. 53 (1); *Hopkinson v. Forster* (1874), 19 Eq. 74;

Marked Cheques.

"At common law there is no objection to the acceptance of a cheque, if the holder likes to take it in lieu of payment, but the Bank Charter Acts would in most cases render this illegal" (n).

However, "a custom has grown up among bankers themselves of marking cheques as good for the purposes of clearance, by which they become bound to one another" (o). As between the bankers themselves, accordingly, this marking has an effect analogous to that of the acceptance of a bill, but it does not give the holder of the cheque a right against the banker who has marked it (p).

With regard to the practice in Canada and the United States of certifying cheques, it has been held that, unless a specific usage enlarging its scope is proved, the only effect of a drawee bank initialling a cheque drawn upon it is to certify that it has funds of the drawer in its hands sufficient to meet its payment, and thus to add to the credit of the drawer that of the bank on which it is drawn. As regards its subsequent negotiation, the cheque is subject to all the rules applicable to uncertified cheques (q).

The case was similar with cheques of the Cheque Bank Company, who contracted with their customers that cheques should not be drawn upon the company except upon their own forms issued for that purpose, and each of which bore upon its face a notification of the maximum amount for which it might be drawn, these forms not being issued until funds to meet them had been paid into the bank (r).

23 W. R. 301; *Schroeder v. Central Bank of London, Limited* (1876), 34 L. T. N. S. 735, at p. 737; 24 W. R. 710. See also Chap. 11 of this Part.—In Scotch law a cheque granted for value and presented for payment operates as an intimated assignation of any funds of the drawer in the hands of the bank up to the amount of the cheque: *British Linen Co. v. Carruthers* (1883), 10 Rettie (4th ser.), 923. Cf. *British Linen Co. v. Rainey's Trustee* (1885), 12 Rettie (4th ser.), 825.

(n) Chalmers' Bills of Exchange, 6th ed. p. 249.

(o) Per Cockburn, C. J., delivering

the judgment of the Exchequer Chamber in *Goodwin v. Roberts* (1875), L. R. 10 Exch. 337, at p. 351. See also the judgment in *Boddington v. Schlenker* (1833), 4 B. & Ad. 752.

(p) Bills of Exchange Act, s. 17 (2), which, like 19 & 20 Vict. c. 97, s. 6, and 41 Vict. c. 13, must be taken as qualifying the effect of the dicta in *Robson v. Bennett* (1810), 2 Taunt. 388.

(q) *Gaën v. Newfoundland Savings Bank*, [1899] A. C. 281; *Imperial Bank of Canada v. Bank of Hamilton*, [1903] A. C. 49. Cf. *Pollard v. Bank of England* (1871), L. R. 6 Q. B. 623.

(r) See Byles on Bills, 16th ed. p. 33.

In *Imperial Bank of Canada v. Bank of Hamilton* (s) a cheque for \$5 certified by the respondent bank's stamp was fraudulently altered to \$500, and paid by the respondent bank to the appellant bank, who were holders for value, under a mistake of fact, which was not discovered till the next day. The respondents sued to recover back \$495 from the appellants. It was held by the Judicial Committee that the respondents were at liberty to prove, as between themselves and an innocent holder for value, that the cheque had been fraudulently altered after it had been certified, and that no negligence was imputable to the respondents in cashing the cheque without examining the drawer's account; and that even if it were, it did not induce the appellants to treat the cheque as good.

Payment by Cheque.

A creditor is not bound to receive payment by a cheque. The tender of payment in this form will only be effectual if the creditor does not object on the ground that he is unwilling to receive a cheque (t).

If a cheque is accepted as absolute payment the debt will be discharged (u). But in the absence of circumstances indicating that this was the intention of the parties—which, *prima facie*, would generally be improbable—it will only amount to conditional payment (x). In this case the debt will be discharged only if the cheque is paid (y); or the party taking it has failed to obtain payment of it owing to his delay in presenting it (z).

A creditor who takes from his debtor's agent on account of the debt the cheque of the agent, is bound to present it for payment within a reasonable time; and if he fails to do so, and by his delay

(s) [1903] A. C. 49.

(t) *Polglass v. Oliver* (1831), 2 Cr. & J. 15.

(u) *Carmarthen and Cardigan Rail. Co. v. Manchester and Milford Rail. Co.* (1873), 8 C. P. 685.

(x) Per Lush, J., in *Currie v. Misa* (1875), L. R. 10 Ex. 153, at p. 163. See also the report of this case on appeal in 1 App. Cas. 554; and *Felix Hadley & Co.*

v. Hadley, [1898] 2 Ch. 680.

(y) *Cohen v. Hale* (1878), 3 Q. B. D. 371; *Ex parte Blackburne* (1804), 10 Ves. 204; *Belshaw v. Bush* (1851), 11 C. B. 191; *Bottomley v. Nuttall* (1858), 5 C. B. N. S. 122; *Elwell v. Jackson* (1884), Cab. & E. 362.

(z) Bills of Exchange Act, s. 74. See also *Bridges v. Garrett* (1870), 5 C. P. 451; 39 L. J. C. P. 251; 22 L. T. 448.

alters for the worse the position of the debtor, the debtor is discharged, although he was not a party to the cheque (*a*).

As a rule, unless he is acting merely as a collector in respect of debts previously incurred, an agent should only receive payment on behalf of his principal in cash. Otherwise neither he nor a purchaser from his principal will be secure from liability to the latter (*b*).

If a debtor is directed or requested by his creditor to remit a cheque or bill, and expressly or impliedly authorized to use the post, and it is lost, the creditor must bear the consequences. A request from a distance will naturally be construed as an authority to use the post as the ordinary means of communication (*c*). But the mere facts that, as between two persons, one has been in the habit of sending cheques to the other in payment of goods supplied, and the other has sent back receipts from time to time when he received the cheques, do not give rise to any inference of a request on the part of the latter to the former to send a cheque by post, or of an agreement on the part of the latter to consider it received as soon as posted. Accordingly, if a crossed cheque payable to order is lost in the post, and the payee's name is forged, and the cheque cashed, the debt of the sender is not discharged (*d*).

If a creditor chooses to accept the cheque of his debtor or of a third party for a smaller amount than that of his debt in satisfaction, the debt will be discharged, although the payment of the same amount in cash would not have had this effect (*e*).

If a purchaser under terms to pay for goods on delivery obtains possession of them by giving a cheque which is afterwards dishonoured, and at the time of giving the cheque he had no

(*a*) *Hopkins v. Ware* (1869), L. R. 4 Ex. 268; 38 L. J. Ex. 147; 20 L. T. 668.

(*b*) *Sweeting v. Pearce* (1859), 7 C. B. N. S. 449; (1861), 9 C. B. N. S. 534; *Earl of Ferrers v. Robins* (1835), 2 C. M. & R. 152; *Sykes v. Giles* (1839), 5 M. & W. 645; *Williams v. Evans* (1866), L. R. 1 Q. B. 352; *Papè v. Westacott*, [1894] 1 Q. B. 272, at p. 278; *Blumberg v. Life Interests and Reversionary Securities Corporation*, [1897] 1 Ch. 171; [1898]

1 Ch. 27; *Johnston v. Boyes*, [1899] 2 Ch. 73; 80 L. T. 488.

(*c*) *Norman v. Ricketts* (1886), 2 T. L. R. 607; *Warwicke v. Noakes* (1791), 1 Peake, 98 [67].

(*d*) *Pennington v. Crossley* (1897), 13 T. L. R. 513; 77 L. T. 43.

(*e*) *Goddard v. O'Brien* (1882), 9 Q. B. D. 37; *Bidder v. Bridges* (1887), 37 Ch. D. 406. Cf. *Foakes v. Beer* (1884), 9 A. C. 605.

reasonable ground to expect that it would be paid, he gains no property in the goods (*f*).

It has even been held in Ireland (*g*) that if, on a sale of goods for ready money, the purchaser gives in payment his cheque, which he then knows he has not funds in the bank to meet, this amounts to a false representation of a material fact which vitiates the sale and entitles the seller to rescind the contract, though the purchaser at the time believed and had reasonable grounds for believing that the cheque would be paid.

Retention of Cheque on Account.—"If a person sends a sum of money on the terms that it is to be taken, if at all, in satisfaction of a larger claim, and if the money is kept, it is a question of fact as to the terms upon which it is so kept. Accord and satisfaction imply an agreement to take the money in satisfaction of the claim in respect of which it is sent. If accord is a question of agreement, there must be either two minds agreeing or one of the two persons acting in such a way as to induce the other to think that the money is taken in satisfaction of the claim, and to cause him to act upon that view. In either case it is a question of fact" (*h*).

Thus, in *Day v. McLea* (*i*), the plaintiffs having made a claim against the defendants for a sum of money as damages for breach of contract, the defendants sent a cheque for a less amount, stating that it was "in full of all demands." The plaintiffs kept the cheque, stating that they did so on account, and brought an action for the balance of their claim. It was held that keeping the cheque was not, as a matter of law, conclusive that there was an accord and satisfaction of the claim, but that it was a question of fact on what terms the cheque was kept. The judge of first instance, sitting without a jury, found in favour of the plaintiffs, and his decision was affirmed on appeal (*k*).

(*f*) *Hawse v. Crowe* (1826), Ry. & M. 414.

(*g*) *Loughnan v. Barry* (1872), 6 Ir. R. C. L. 457.

(*h*) Per Bowen, L. J., in *Day v. McLea* (1889), 22 Q. B. D. 610, at p. 613.

(*i*) See last note.

(*k*) See also *Ackroyd v. Smithies* (1885), 54 L. T. 130.

Loan by Cheque.

In the case of a loan by cheque the advance is to be considered made when the money is paid by the lender's banker, and the Statute of Limitations only runs from that time (*l*).

Deposit with Stakeholder.

Where a cheque is deposited with a stakeholder, it is no breach of duty on his part to cash it pending the decision as to who is entitled to recover (*m*).

Seizure in Execution.

Under a writ of *fi. fa.* the sheriff may seize money, bank-notes, cheques, bills of exchange, promissory notes, bonds, specialties, or other securities for money belonging to the person against whose effects such writ of *fi. fa.* shall be sued out, and may pay money or bank-notes so seized to the execution creditor, and may sue for the amount secured by bills of exchange and other securities, and pay over to the execution creditor the money so recovered (*n*).

Cheques as Evidence.

A cancelled cheque is *prima facie* evidence of a payment of a debt, and not of a loan to the customer, by the banker (*o*).

The mere production of a cheque shown to have been drawn by A. in favour of B. is no evidence of money lent by B. to A. (*p*).

A cheque proved to have been in circulation may be evidence of payment (*q*).

Where the defendant, having money of the plaintiff in his hands, drew a cheque in favour of the plaintiff, which was paid to the

(*l*) *Garden v. Bruce* (1868), 3 C. P. 300.

(*m*) *Wilkinson v. Godefroy* (1839), 9 A. & E. 536.

(*n*) 1 & 2 Vict. c. 110, s. 12. See also the County Courts Act, 1888 (51 & 52 Vict. c. 43), ss. 147, 148.

(*o*) *Fletcher v. Manning* (1844), 12 M.

& W. 571. Cf. *Egg v. Barnett* (1800), 3 Esp. 196; *Cary v. Gerrish* (1801), 4 Esp. 9; *Aubert v. Walsh* (1812), 4 Taunt. 293.

(*p*) *Pearce v. Davis* (1834), 1 Moo. & Rob. 365.

(*q*) *Thompson v. Pitman* (1858), 1 F. & F. 339.

plaintiff, it was held that this was evidence of payment, without proof that the plaintiff had received the cheque from the defendant (*r*).

Action upon Cheque.

In an action upon a cheque the summary procedure under Ord. XIV. is, of course, applicable.

Upon an application under that Order for leave to enter final judgment upon a writ specially indorsed with a claim for the amount of a dishonoured cheque, the affidavit verifying the cause of action need not contain an allegation that notice of dishonour has been given to the drawer. "A defendant," said Wills, J., "in an action on a dishonoured cheque is not indebted unless notice of dishonour has been given. The function of the affidavit is to verify the cause of action, and it does not matter that it does not state or verify all the particulars given in the statement of claim or special indorsement. The statement of claim or special indorsement would, it is true, be defective if the allegation of notice of dishonour were omitted, but the verification of the cause of action in the affidavit may be made in general terms" (*s*).

Lost Cheque.—In any action or proceeding upon a cheque the Court or a judge may order that its loss shall not be set up, provided an indemnity be given, to the satisfaction of the Court or judge, against the claims of any other person thereon (*t*).

Relation to Bills of Exchange.

Cheques are instruments belonging to the genus called Bills of Exchange. But the characteristic features by which they are distinguished from other instruments of this class are sufficiently important to necessitate their treatment as a separate species in themselves.

Baron Parke, delivering the judgment of the Judicial Committee

(*r*) *Mountford v. Harper* (1847), 16 M. & W. 825; distinguishing *Lloyd v. Sandilands* (1818), Gow, 13, at p. 15.

(*s*) *May v. Chidley*, [1894] 1 Q. B. 451. See also *Roberts v. Plant*, [1895] 1 Q. B. 597, as to amendment of the

indorsement on the writ.

(*t*) Bills of Exchange Act, s. 70. See *Taylor v. Scrivens* (1839), 1 Beav. 571; *Rhodes v. Morse* (1850), 14 Jur. 800; *Johns v. Mason* (1851), 9 Hare, 29. Cf. also Part VI. Chap. 1.

in *Ramchurn Mullick v. Luchmechund Radakissen* (*u*), expressed himself thus: "A banker's cheque . . . is a peculiar sort of instrument, in many respects resembling a bill of exchange, but in some entirely different. A cheque does not require acceptance; in the ordinary case it is never accepted; it is not intended for circulation; it is given for immediate payment; it is not entitled to days of grace. . . . The person giving the cheque must be considered as the person primarily liable to pay, who orders his debt to be paid at a particular place, and as being much in the same position as the maker of a promissory note, or the acceptor of a bill of exchange, payable at a particular place, and not elsewhere, who has no right to insist on immediate presentment at that place" (*x*).

The chief points of difference between cheques and bills of exchange are summarized in Byles on Bills (*y*) as follows: "Cheques are not accepted, hence the holder cannot sue the bank. The drawer is not discharged by the holder's failure to present in due time, unless the bank fail. Notice of dishonour to the drawer is rarely legally necessary, as absence of effects (*z*) in the drawee's hands, the almost universal cause of dishonour, excuses it, as does countermand of payment. They must be drawn on a banker, and payable on demand, and are generally, though not necessarily, inland. And finally, the banker is protected against a forged or unauthorized indorsement of a draft on him to order on demand."

The Bills of Exchange Act declares (*a*) that a cheque is a bill of exchange drawn on a banker payable on demand, and enacts that the provisions of that statute applicable to a bill of exchange payable on demand shall apply to a cheque, except as otherwise provided in Part III. of the Act, which deals specially with cheques (*b*).

(*u*) (1854), 9 Moo. P. C. 46.

(*x*) Cf. the judgments in *Keene v. Beard* (1860), 8 C. B. N. S. 372; and Lord Blackburn's observations in *M'Lean v. Clydesdale Banking Co.* (1883), 9 A. C. 95, at pp. 106-7.

(*y*) 16th ed. p. 33.

(*z*) *I.e.*, of sufficient effects: *Carew v. Duckworth* (1869), L. R. 4 Ex. 313.

(*a*) Sect. 73.

(*b*) For the entire Act see Appendix II. of this treatise.

CHAPTER IV.

THE ISSUE OF CHEQUES.

THE issue of a cheque is its first delivery complete in form to a person who takes it as a holder (*a*).

In other words, a cheque is issued when it is placed in the hands of a party entitled to demand cash for it (*b*).

If the drawer of a cheque hands it to another person intending that the cheque shall be paid, he issues it, although he may have been induced to do so by fraud (*c*).

The drawer is not liable upon a cheque until he has issued it (*d*), or precluded himself from denying its issue.

Cheques Stolen before Issue.

It is accordingly necessary to consider whether, although a document purporting to be a cheque is in due form and properly signed, the banker may nevertheless be liable to bear the loss occasioned by paying its amount if it turn out that the customer never issued it, and that, therefore, it was not, in the legal sense, his cheque. If so, it is impracticable for the banker to provide against this risk by any degree of care.

It is, however, conceived that the law is otherwise. If the cheque "be stolen, or if after being lost by the drawer it is found by some other person, it is not, in the hands of the thief or of the finder, 'issued' as against the drawer. But so far as concerns the bank, it would be considered as issued, and the bank would be

(*a*) Bills of Exchange Act, s. 2.

(*b*) Per Erskine, C. J., in *Ex parte Bignold* (1836), 1 Deac. 712, at p. 735.

(*c*) *Clutton v. Attenborough & Son*,

H.

[1897] A. C. 90. Cf. *Lewis v. Clay* (1897), 14 T. L. R. 149; *Jones v. Lock* (1865), 35 L. J. Ch. 117.

(*d*) Bills of Exchange Act, s. 21.

protected in paying it, provided it did so *bonâ fide*, and with no knowledge of the precedent circumstances" (e).

The Bills of Exchange Act provides—

21.—(1.) Every contract on a bill, whether it be the drawer's, the acceptor's, or an indorser's, is incomplete and revocable until delivery of the instrument in order to give effect thereto :

Provided that where an acceptance is written on a bill, and the drawee gives notice to or according to the directions of the person entitled to the bill that he has accepted it, the acceptance then becomes complete and irrevocable.

(2.) As between immediate parties, and as regards a remote party other than a holder in due course, the delivery—

(a) in order to be effectual must be made either by or under the authority of the party drawing, accepting, or indorsing, as the case may be ;

(b) may be shown to have been conditional or for a special purpose only, and not for the purpose of transferring the property in the bill.

But if the bill be in the hands of a holder in due course a valid delivery of the bill by all parties prior to him so as to make them liable to him is conclusively presumed.

(3.) Where a bill is no longer in the possession of a party who has signed it as drawer, acceptor, or indorser, a valid and unconditional delivery by him is presumed until the contrary is proved.

In *Scholey v. Ramsbottom* (f) the plaintiff drew a cheque for 366l., but finding that the sum was incorrect he tore it into four pieces, which he threw from him, and then drew another cheque in the same form for 360l. The latter was presented for payment and paid the same day. Five days after, the first cheque was likewise presented for payment by a person unknown. The four pieces into which it had been torn had been neatly pasted together upon another slip of paper ; but the rents were quite visible, and the face of the cheque was soiled and dirty. The defendants' clerk paid it, however, without making any inquiries. Lord Ellenborough thought that under such circumstances bankers were not justified in paying a cheque, and the jury found accordingly.

This case would seem to indicate that Lord Ellenborough

(e) *Morse's Law of Banking* (American), 4th ed. p. 687.

(f) (1810), 2 Camp. 485.

thought that, if the document consisting of the pieces of the torn cheque pasted together, in a clean condition, had been presented promptly and before the other cheque, and the rents had not been visible, the customer might have been chargeable.

In *Ingham v. Primrose* (g) A. accepted a bill and gave it to B., who put his name thereto as drawer, for the purpose of his procuring it to be discounted and handing over the proceeds to him. B. having failed to discount it, returned the bill to A., who tore the bill in half, intending, as the jury found, to cancel it, and threw the two pieces into the street. B. picked them up in A.'s presence, and afterwards pasted the two pieces together and put the bill in circulation. The tearing of the bill was done in such a way that the appearance of the bill was as consistent with its having been divided for the purpose of safe transmission by the post as with its having been torn for the purpose of destroying it. It was held—it being reserved for the Court to draw inferences of fact—that A. was liable upon the bill at the suit of a *bonâ fide* holder without notice.

Williams, J., delivering the judgment of the Court of Common Pleas, said: "It is, we think, settled law that if the defendant had drawn a cheque, and before he had issued it he had lost it, or it had been stolen from him, and it had afterwards found its way into the hands of a holder for value without notice, who had sued the defendant upon it, he would have had no answer to the action. So, if he had indorsed in blank a bill payable to his order, and it had been lost or stolen before he delivered it to any one as indorsee. The reason is, that such negotiable instruments have, by the law merchant, become part of the mercantile currency of the country; and, in order that this may not be impeded, it is requisite that innocent holders for value should have a right to enforce payment of them against those who by making them have caused them to be a part of such currency. In the present case, the defendant made the bill in question, and rendered it a negotiable instrument, and then tried in vain to get it discounted. It was then returned to him, and was intended by him to be wholly withdrawn from circulation. But it was, notwithstanding, again

put into circulation through the fraud of another man, and reached the hands of the plaintiff, who held it for value, without any notice of the fraud. If these were all the facts of the case, it appears to be impossible to distinguish it in any material point from the cases already mentioned, of liability when the original circulation has been effected by fraud, without the consent of him who made the instrument" (*h*).

In *Baxendale v. Bennett* (*i*) the defendant gave H. his blank acceptance on a stamped paper, and authorized H. to fill in his name as drawer. H. returned the blank acceptance to the defendant in the same state in which he received it. The defendant put it into a drawer of his writing-table at his chambers, which was unlocked, and it was lost or stolen. C. afterwards filled in his own name without the defendant's authority, and an action was brought on it by the plaintiff as indorsee for value. It was held that the defendant was not liable on the bill,—by Bramwell, L. J., on the ground that there was no estoppel between the parties which prevented the defendant from setting up the true facts, and that, if the defendant had been guilty of negligence, it was not the proximate or effective cause of the fraud; and by Brett, L. J., on the ground that, after the return of the blank acceptance by H., the defendant had never authorized any one to fill in a drawer's name, and that he had never issued the acceptance intending it to be used.

Brett, L. J., in the course of his judgment, said: "The defendant signed a blank acceptance and gave it to a person who wanted money that he might get it discounted; that person sent the blank acceptance back to the defendant, who put it into a drawer in his room; the room was not a place of general resort, and the drawer into which the acceptance was put was left unlocked; somebody, not a servant of the defendant, stole it, and it was filled up by a different person from him to whom the acceptance was originally given and who had returned it. . . . It seems to me that the defendant never authorized the bill to be filled in with a drawer's name, and he cannot be sued on it. I do not think it right to say that the defendant was negligent. The

(*h*) As to this case, see the observations of Brett, L. J., in the following case, at p. 262, *infra*.
(*i*) (1878), 3 Q. B. D. 525.

law as to the liability of a person who accepts a bill in blank, is that he gives an apparent authority to the person to whom he issues it to fill it up to the amount that the stamp will cover; he does not strictly authorize him, but enables him to fill it up to a greater amount than was intended. Where a man has signed a blank acceptance, and has issued it, and has authorized the holder to fill it up, he is liable on the bill, whatever the amount may be, though he has given secret instructions to the holder as to the amount for which he shall fill it up; he has enabled his agent to deceive an innocent party, and he is liable. Sometimes it is said that the acceptor of such a bill is liable because bills of exchange are negotiable instruments, current in like manner as if they were gold or bank-notes; but whether the acceptor of a blank bill is liable on it depends upon his having issued the acceptance intending it to be used. No case has been decided where the acceptor has been held liable if the instrument has not been delivered by the acceptor to another person. In this case it is true that the defendant, after writing his name across the stamped paper, sent it to another person to be used. When he sent it to that person, if he had filled it in to any amount that the stamp would cover, the defendant would be liable, because he sent it with the intention that it should be acted upon; but it was sent back to the defendant, and he was then in the same condition as if he had never issued the acceptance. The case is this: the defendant accepts a bill and puts it into his drawer, it is as if he had never issued it with the intention that it should be filled up; it is as if, after having accepted the bill, he had left it in his room for a moment and a thief came in and stole it. He has never intended that the bill should be filled up by anybody, and no person was his agent to fill it up. Then it has been said that the defendant is liable because he has been negligent. But was the defendant negligent? As observed by Blackburn, J., in *Swan v. North British Australasian Co. (k)*, there must be the neglect of some duty owing to some person. Here, how can the defendant be negligent who owes no duty to anybody—against whom was the defendant negligent, and to whom did he owe a duty? He put the bill into a drawer in his

(k) (1863), 2 H. & C. 175; 32 L. J. Ex. 273.

own room; to say that was a want of due care is impossible; it was not negligence for two reasons: first, he did not owe any duty to anyone; and, secondly, he did not act otherwise than in a way which an ordinary careful man would act."

Reviewing the authorities, the learned judge referred to *Ingham v. Primrose* (l), and said: "It seems to me to be difficult to support that case, and the correct mode of dealing with it is to say we do not agree with it." His Lordship concluded by saying: "In the present case I think there was no estoppel, no ratification, and no negligence, and that the defendant is entitled to our judgment" (m).

The point was left open in *Clutton v. Attenborough* (n). Lord Halsbury there said: "If, contrary to the intention of the person who had signed the document, it got out of his possession, it being stolen out of his strong-box or what not, I may or may not have some opinion as to what would be the legal result of that; but that is not the question here, and I therefore absolutely decline to consider it." And Lord Shand said: "The learned counsel for the appellants argued that the case was the same as if the cheques had been stolen from a strong-box in which they had been locked away—as if they had been cheques which it might be the drawer kept in his own repositories, and which were either not intended to be issued at all, or, at all events, to be issued only in certain contingencies. That would, however, be an entirely different case from this" (o).

In *Lewis v. Clay* (p) it was held that a person who, without any want of due care, is fraudulently induced to sign a bill or note under the belief that he is merely witnessing a signature is not liable thereon to a holder in due course. It was further held that a "holder in due course," in sect. 29 of the Bills of Exchange Act, means a person to whom, after its completion by, and as

(l) (1859), 7 C. B. N. S. 82; 28 L. J. C. P. 294.

(m, Cf. the judgment of the Court in *Marston v. Allen* (1841), 8 M. & W. 494, at p. 504.

(n) [1897] A. C. 90, at pp. 93, 96.

(o) See also *Arnold v. The Cheque Bank* (1876), 1 C. P. D. 578; *Redfern & Son v. Rosenthal Brothers* (1902), 18 T. L. R. 718; *Bell v. Marsh*, [1903] 1 Ch. 528; Byles on Bills, 16th ed. pp. 259, 260, and the authorities there cited.

(p) (1897), 14 T. L. R. 149.

between, the immediate parties, a bill or note has been negotiated, and does not include the payee.

In *Watson v. Russell* (g) the defendant chartered a ship to K. at a certain rate per week, to be paid every four weeks in advance. On the second payment becoming due, K. received from the plaintiff, through whom he had sub-chartered the ship to B., a cheque for half the amount due, payable to the order of the defendant, upon the terms that K. should inform the defendant that the advance was made in consideration that the ship should be allowed to perform the charter. K. paid the cheque to the defendant, but omitted to inform him of the terms on which it had been given, and he had no notice of them; and, the remainder of the money being unpaid, the defendant, who had obtained cash for the cheque, stopped the ship. It was held that an action for money had and received to recover the amount of the cheque was not maintainable by the plaintiff against the defendant, as there was no privity between them, and that the action, if any, ought to have been brought by K.

It is conceived that different considerations apply as between the banker and his customer from those which are applicable as between the drawer and the holder of a bill or cheque. The customer owes a duty to his banker to refrain from negligence whereby the banker may be led into making a payment believing it to be on his customer's behalf, though in reality otherwise (r). If, therefore, the customer's negligence has caused the payment of the cheque, he will be chargeable with its amount. In considering whether he has been guilty of negligence, his relation to the banker must be borne in mind.

To take an extreme case: If a customer draws a cheque, and then leaves it in a public place through pure carelessness, and it is taken thence and cashed, it is conceived that he would be chargeable by the banker with its amount. In this case his conduct would be the real and effective cause of the banker's belief that the cheque had been duly issued and of his payment of its amount. The felony would be the proximate cause of the presentation rather than of the apparent issue.

(g) (1865), 5 B. & S. 968.

(r) See pp. 278—282, *infra*.

On the other hand, if, after drawing the cheque, the customer places it in a drawer which he locks, or leaves unlocked, or if he leaves it upon his writing-table, or in his garden, in each case a question arises as to negligence which different minds might decide differently.

It is submitted that, in any of the cases supposed, the customer would be chargeable. As he knows that the banker is liable to grave consequences if he dishonours any properly drawn cheque, it would seem that in fairness he ought to be held liable if a document has acquired the appearance of being a cheque through his own act.

Possibly his liability may be put upon another ground, namely, that of an implied agreement on his part that the banker should be at liberty to charge him with the amount of any draft purporting to be a cheque signed by him and presented in an unaltered form, whether it has been issued by him or not; or on the ground of an implied promise on his part to indemnify the banker against anything which he may do on his account while acting reasonably and diligently and in the ordinary course of banking business. If such be the principle applicable, it would cover even the extreme case of a cheque signed under circumstances like those in *Lewis v. Clay* (s).

(s) See p. 262, *supra*.

CHAPTER V.

THE DATE.

A CHEQUE need not bear any date (*a*). If dated on a Sunday it will be valid (*b*).

It may be ante-dated or post-dated (*c*).

Stale Cheques.

Duty of Banker.—There does not appear to be any authority defining the period after the date of a cheque within which a banker is bound to pay it or justified in doing so.

It is, however, the custom of bankers to honour cheques within six months from the date upon which they purport to be drawn. Some bankers honour them within longer periods, a year being not infrequently adopted as the limit. When dishonoured on the ground of lapse of time, they are returned marked “out of date.”

The fact, however, that a cheque is dated even less than six months before presentation may, if coupled with other circumstances of suspicion, be some evidence of its cancellation (*d*).

Position of Drawer and Holder.—As between the drawer of a cheque and the holder, no time within six years is too late for presentment to the banker for payment unless some loss to the drawer has been occasioned by the delay (*e*). Accordingly, when the drawees continue solvent and have effects of the drawer in their hands, the holder will not lose his right of action against the

(*a*) Bills of Exchange Act, s. 3 (4) (a).

(*b*) *Ibid.* s. 13 (2).

(*c*) *Ibid.* As to post-dated cheques, see further, p. 268, *infra*.

(*d*) See *Scholey v. Ramsbottom* (1810), 2 Camp. 485, cited at p. 258, *supra*.

(*e*) *Laws v. Rand* (1857), 4 Jur. N. S. 74; 3 C. B. N. S. 442; 27 L. J. C. P. 76.

drawer by any delay short of the period of limitation in presenting the cheque for payment (*f*).

But if the banker fails the drawer will be discharged from his liability if the cheque has not been presented within a reasonable time of its issue, and the state of the drawer's account was such that it would have been honoured if so presented. This subject is further considered in Part V. Chap. 2.

But if a cheque is subject to any defect of title, a person to whom it is negotiated, when it appears on the face of it to have been in circulation for an unreasonable length of time, acquires no better title than that which the person from whom he took it had (*g*). What is an unreasonable length of time for this purpose is a question of fact (*h*).

In *Rothschild v. Corney* (*i*) the plaintiff, who had been defrauded by a third party, sued the defendants, who had obtained payment of certain cheques, to recover their amount. Lord Tenterden, C. J., said: "It cannot be laid down as matter of law that a party taking a cheque after any fixed time from its date does so at his peril; and, therefore, the mere fact of the defendants having taken the cheques six days after they bore date, from a person who had not given value for them, did not entitle the plaintiff to a verdict. It was, indeed, a circumstance to be taken into consideration by the jury in determining whether the defendants had taken the cheques under circumstances which ought to have excited the suspicions of prudent men."

In *Serrell v. Derbyshire Railway Co.* (*k*) a cheque dated August 13th, 1847, was not presented by the transferee until October 6th, and Mr. Justice Maule said: "There is no such strict rule of law as to cheques, that they *must* be presented promptly. But, where a reasonable time has passed, they stand in this respect upon the same footing as bills of exchange." His Lordship thought that the cheque in that particular case might probably be considered as in the nature of an overdue bill, and, fraud being shown in its inception, the onus was thrown upon the plaintiff of showing how he got it.

(*f*) *Robinson v. Hawksford* (1846), 15 L. J. Q. B. 377. See also *Serle v. Norton* (1841), 2 M. & R. 401; 9 M. & W. 309.

(*g*) See *Ex parte Hughes, In re Cobb*

(1880), 43 L. T. 577.

(*h*) Bills of Exchange Act, s. 36 (2) (3).

(*i*) (1829), 9 B. & C. 388.

(*k*) (1850), 9 C. B. 811.

In *London and County Banking Co. v. Groome* (*l*) a cheque for 98*l*., dated the 21st of August, 1880, directing the National Bank to pay that sum to A. M. or bearer, was handed by the defendant (the drawer) to one C. under circumstances which, if C. had been suing upon it, would have been an answer to his claim. In fraud of the defendant, C., on the 29th, paid it into his account with the London and County Banking Company, who, upon the presentment and dishonour of the cheque on the same or the following day, sued the drawer for the amount. There was no evidence of the absence of *bona fides* on the part of the plaintiffs, or that they had notice of the alleged fraud of C. It was held that the plaintiffs were entitled to recover.

In *Boehm v. Sterling* (*m*) the facts were of a very exceptional nature. There the drawers of a cheque issued it nine months after it bore date upon a consideration which afterwards failed as between them and Muilman & Co., to whom they delivered it. It was held that they could not defend an action by a subsequent holder for value without notice on this ground. "When," said Laurence, J., "it is considered that it was not issued until nine months after it bore date, it could not have been intended by the defendants that the date of the bill should throw any difficulty on the holder. It was manifestly the intention of the parties that if Muilman & Co. paid their acceptance they should be at liberty to pass this cheque to whom they pleased; and, if so, it was not necessary for the plaintiffs to inquire how Muilman & Co. got possession of the cheque. Therefore, as between these parties, the rule laid down in *Brown v. Davies* (*n*) does not apply, though I think it ought to obtain in all other cases, and that it is not infringed by a determination in favour of the plaintiffs in this case" (*o*).

Position of Indorser.—If the cheque is not presented within a reasonable time after its indorsement, the indorser will be discharged (*p*).

(*l*) (1881), 8 Q. B. D. 288.

(*m*) (1797), 7 T. R. 423; 2 Esp. 575.

(*n*) (1789), 3 T. R. 80, where it was held that a person taking an overdue note takes it on the credit of the person who gives it to him. Cf. *Hubbard v.*

Jackson (1827), 4 Bing. 390; 3 C. & P. 134.

(*o*) As to the operation of the Statute of Limitations, see *In re Bethell, Bethell v. Bethell* (1887), 34 Ch. D. 561.

(*p*) Bills of Exchange Act, s. 45.

Post-dated Cheques.

A post-dated cheque is valid as between the holder and the drawer and intermediate parties. The negotiability of the cheque is not affected by its being post-dated (*q*), even in the case of a holder to whom it has been transferred before the arrival of the date which it bears (*r*).

A stamp objection that a cheque was post-dated cannot be maintained if the action upon it is brought after the date of the cheque, although the holder took it with knowledge of the post-dating (*q*).

But the similarity as regards practical effect between a post-dated cheque and a bill of exchange at so many days' date as intervene between the day of delivering the cheque and the date marked upon it may incidentally have important consequences for the holder. Thus, a member of a firm of solicitors, as distinguished from a firm of traders, has no implied authority to bind his co-partners by a post-dated cheque drawn in the name of the firm, because he has no such authority as to a bill (*s*).

As between the banker and his customer, the banker will not be justified in paying a post-dated cheque before its date. If he does so, and loss ensues in consequence, it will fall upon him. So, where a cheque which had been lost by the payee was paid the day before it bore date, the banker was held liable to repay the amount (*t*).

On, or after, its date the banker may safely pay the cheque, as in so doing he is complying with the order of his customer. Moreover, he is probably under an implied obligation to do so (*u*).

(*q*) *Bull v. O'Sullivan* (1871), L. R. 6 Q. B. 209; *Gatty v. Fry* (1877), 2 Ex. D. 265; *Hitchcock v. Edwards* (1889), 60 L. T. 636; *Royal Bank of Scotland v. Tottenham*, [1894] 2 Q. B. 715; Bills of Exchange Act, s. 13 (2). Cf. *Misa v. Currie* (1876), 1 A. C. 554, at p. 564.

(*r*) *Carpenter v. Street* (1890), 6 T. L. R. 410.

(*s*) *Forster v. Mackreth* (1867), L. R. 2 Ex. 163.

(*t*) *Da Silva v. Fuller* (1776), Sel. Ca. MS. 238; Chitty on Bills of Exchange, 11th ed. p. 188, cited by Parke, B., in *Morley v. Culverwell* (1840), 7 M. & W. 174, at p. 178. See also Bills of Exchange

Act, s. 59.

(*u*) In *Emanuel v. Roberts* (1868), 9 B. & S. 121; 17 L. T. 646, it was found that it was a custom of bankers in the city of London not to pay at any time cheques marked "post-dated," and it was held that this custom was part of the contract between a London banker and his customer, and that, therefore, a customer could not maintain an action against his banker for refusing payment of a cheque so marked. But since the Stamp Act, 1870, repealed the Acts which prohibited the post-dating of cheques, the custom of London bankers has changed.

CHAPTER VI.

THE SIGNATURE.

IT is not necessary to the validity of a cheque that the drawer should sign it with his own hand; it is sufficient if his signature is written thereon by some other person by or under his authority (*a*).

The signature need not appear at the foot of the cheque. It is sufficient if the drawer has written his name in any part with the intention of ordering the payment mentioned.

Thus, if the draft runs, "I John Styles order you to pay," &c., and it is in his handwriting, it will be sufficiently signed (*b*).

Apparently the signature may be in pencil (*c*).

The Necessary Signature.

When a cheque is presented to a banker for payment he must satisfy himself that it amounts to the order of his customer. This involves two distinct considerations: 1. Does it purport to bear the signature of his customer, or a signature which his customer has instructed him to honour? 2. Is the signature genuine?

In connection with the first of these considerations no difficulty can arise in respect of a cheque apparently drawn against the account of an individual customer, or the joint account of several, when the signature purports to be that of the customer himself (*d*)

(*a*) Bills of Exchange Act, s. 91. But unless the banker had been apprised of the authority he would not be liable for dishonouring the cheque until he had been able to ascertain that it was in fact authorized.

(*b*) *Taylor v. Dobbins* (1719), 1 Strange, 399.

(*c*) *Geary v. Physic* (1826), 5 B. & C. 234.

(*d*) Cf. *Jacobs v. Morris*, [1901] 1 Ch. 261, at pp. 269, 270; [1902] 1 Ch. 816.

in the one case, or of all the customers in the other. It is the same when the signature purports to be a signature which the banker has been instructed to honour in the one case by the individual and in the other by the several individuals.

Initials.—If the banker has been instructed only to honour the cheques of a customer if initialled by some other person or persons, he must not honour any cheque which is not so initialled (*e*).

In the case of joint accounts or accounts of corporations questions of difficulty may more easily arise.

Joint Accounts.—In the case of an ordinary joint account, in the absence of special instructions from each of the parties, the banker can, with safety, only honour cheques signed by all.

“It is part of the law merchant,” said Mr. Justice Maule (*f*), “that bankers shall not pay to one of several jointly interested, without the consent of the others, except by an express agreement. . . . It is a general rule that a man may pay a debt to one of several persons with whom he has contracted jointly. In the case of a banker he cannot do so; but that arises from the particular contract which exists between him and his customer.” “Where trustees or others have a joint account with them as bankers, it is usual to require the authority of the whole to pay the money. But that arises from the peculiar contract and relation between bankers and their customers” (*g*).

“When a plurality of persons, not being persons in trade, have money in a bank, they must each sign the cheque. If one abscond, equity would relieve the others, and assist them to get the money” (*h*).

Partnership Accounts.—When the account is that of a firm trading in partnership, one partner will apparently have an implied authority to sign cheques drawn upon the bankers of the

(*e*) Per Kekewich, J., in *In re Barney, Barney v. Barney*, [1892] 2 Ch. 265; *Twibell v. London Suburban Bank*, cited at p. 271, *infra*. Cf., however, *In re Montague, Ex parte Ward*, cited at p. 136, *supra*.

(*f*) In *Husband v. Davis* (1851), 20 L. J. C. P. 118, at p. 120; 10 C. B.

645; 2 L. M. & P. 50.

(*g*) At p. 650 of the report in 10 C. B. of the case cited in the last note. See also *Innes v. Stephenson* (1831), 1 Moo. & Rob. 145.

(*h*) Byles on Bills, 16th ed. p. 26, referring to *Ex parte Hunter* (1816), 2 Rose, 363; 1 Mer. 408.

firm in the partnership name (*i*). It will, however, be otherwise if special instructions to the contrary have been communicated to the banker by or on behalf of the firm: for *expressum facit cessare tacitum*.

In Lindley on Partnership (*k*) it is stated: "If one partner directs the bankers of the firm not to pay a cheque of the firm, the bankers incur no liability to the firm if they follow such directions." But to the present writer it appears that, if the banker knew that the partner in question was acting in opposition to the other members or member of the firm in this matter, it would be otherwise (*l*).

In *Twibell v. London Suburban Bank* (*m*) the plaintiff and his partner, at the time of opening an account at the defendants' bank, stipulated that no cheque drawn in the name of the firm by one of the partners should be honoured by the bank unless it bore the initials of the other partner. The bank having, in violation of this contract, paid a cheque drawn in the name of the firm by the plaintiff's partner, without having the initials of the plaintiff, the Court of Common Pleas held that the plaintiff was entitled to sue for this breach of contract, and that the proper measure of damages was a moiety of the sum for which the cheque was drawn.

Account of Husband and Wife.—In the absence of special instructions it would be unsafe for the banker to apply to such an account any rule differing from that which has been stated with regard to joint accounts generally (*n*). The decisions pronounced before the Married Women's Property Act, 1882, came into operation, cannot now be relied upon as affording guidance in this matter (*o*).

Account of Corporation.—In the case of a cheque purporting to be drawn against the account of a corporation, the banker must be satisfied that the signature is that of the person or persons appa-

(*i*) Byles on Bills, 16th ed. p. 52; Lindley on Partnership, 6th ed. p. 146. See also *Backhouse v. Charlton*, cited at p. 163, *supra*; *Bull v. O'Sullivan* (1871), L. R. 6 Q. B. 209.

(*k*) 6th ed. p. 146.

(*l*) See what is said in Lindley on Partnership, at p. 219, upon the revo-

cation of authority.

(*m*) W. N. (1869) 127.

(*n*) See *In re Montague, Ex parte Ward*, cited at p. 136, *supra*.

(*o*) See, for example, *Lloyd v. Pugh* (1872), 8 Ch. 88; *London Chartered Bank of Australia v. Lemprière* (1873), L. R. 4 P. C. 572.

rently authorized in that behalf, and who, if the proper formalities had been observed in his or their appointment, would have had authority to sign in such manner under the articles of association or other regulations of the corporation.

In *Mahony v. East Holyford Mining Co.* (p) W., in concert with some friends and dependants of his, started a company called a mining company. The memorandum and articles of association were registered. Subscriptions were obtained from persons becoming shareholders, and these subscriptions were paid into a bank, which had been described in the prospectuses of the company, as the bank for the company. The bankers received a formal notice, signed by the person who described himself as the secretary of the company, that they were to pay the cheques signed by "either two of the following three directors," and countersigned by himself, in accordance, as stated, with a "resolution passed this day;" and the names of the three persons described as directors, and their signatures, were inclosed with the "resolution." The bankers from time to time, while the business of the company appeared to be going on, received cheques signed and countersigned as described, and duly honoured them. When the fund had been almost entirely drawn out, the company was ordered to be wound up. It then appeared that there never had been a meeting of shareholders, nor any appointment of directors or of a secretary, but that the persons who had got up the company had treated themselves as directors and secretary, and appropriated the money obtained from the subscriptions. It was held that the official liquidator could not recover from the bankers the amount of the cheques which, under the circumstances disclosed in the case, they had thus *bonâ fide* paid. It was, moreover, laid down that where those who draw and those who (*bonâ fide*) honour cheques, intend them to operate on a certain account, no objection can afterwards be taken that that account is not specifically mentioned on the face of the cheques.

"It is a point of very great importance," said Lord Hatherley, "that those who are concerned in joint stock companies and those who deal with them should be aware of what is essential to the

due performance of their duties, both as customers or dealers with the company, and as persons forming the company and dealing with the outside world respectively. On the one hand, it is settled by a series of decisions, of which *Ernest v. Nicholls* (g) is one and *Royal British Bank v. Turquand* (r) a later one, that those who deal with joint stock companies are bound to take notice of that which I may call the external position of the company. Every joint stock company has its memorandum and articles of association; every joint stock company, or nearly every one, I imagine (unless it adopts the form provided by the statute, and that comes to the same thing), has its partnership deed under which it acts. Those articles of association and that partnership deed are open to all who are minded to have any dealings whatsoever with the company, and those who so deal with them must be affected with notice of all that is contained in those two documents. After that, the company entering upon its business and dealing with persons external to it, is supposed on its part to have all those powers and authorities which, by its articles of association and by its deed, it appears to possess; and all that the directors do with reference to what I may call the indoor management of their own concern, is a thing known to them and known to them only; subject to this observation, that no person dealing with them has a right to suppose that anything has been or can be done that is not permitted by the articles of association or by the deed. For instance, a person dealing with such a company as this, a mining company, could not attempt to set up any right upon a policy of insurance as having been granted to him by the directors of the company, or to found a claim upon any other matter which is not a matter contained in their articles of association. He must be taken to have perfect knowledge that they had no power to do anything of that kind, and therefore nothing can be of any avail to him that is contrary to the articles of association, with which he must be taken to be acquainted. This being the case, a banker dealing with a company must be taken to be acquainted with the manner in which, under the articles of association, the moneys of the company may be drawn out of his bank for the purposes of the company.

(g) (1857), 6 H. L. Cas. 401.

(r) (1856), 6 El. & Bl. 327.

My noble and learned friend on the woolsack has read those articles by which, in this case, the bankers were informed that cheques might be drawn upon the bank by three directors of the company. And the bankers must also be taken to have had knowledge, from the articles, of the duties of the directors, and the mode in which the directors were to be appointed. But, after that, when there are persons conducting the affairs of the company in a manner which appears to be perfectly consonant with the articles of association, then those so dealing with them, externally, are not to be affected by any irregularities which may take place in the internal management of the company. They are entitled to presume that that of which only they can have knowledge, namely, the external acts, are rightly done, when those external acts purport to be performed in the mode in which they ought to be performed. For instance, when a cheque is signed by three directors, they are entitled to assume that those directors are persons properly appointed for the purpose of performing that function, and have properly performed the function for which they have been appointed. Of course, the case is open to any observation arising from gross negligence or fraud. I pass that by as not entering into the consideration of the question at the present time. Outside persons when they find that there is an act done by a company, will, of course, be bound in the exercise of ordinary care and precaution to know whether or not that company is actually carrying on and transacting business, or whether it is a company which has been stopped and wound up, and which has parted with its assets, and the like. All those ordinary inquiries which mercantile men would, in the course of their business, make, I apprehend, would have to be made on the part of the persons dealing with the company" (s).

In connection with this subject reference may be made to what is said under the head "Right to the Credit Balance" in Part II. Chap. 11, and to Part VIII. Chap. 3.

(s) See also *County of Gloucester Bank v. Rudry, &c. Co.*, [1895] 1 Ch. 629; *Owen and Ashworth's Claim*, [1900] 2 Ch. 272;

[1901] 1 Ch. 115; *Duck v. Tower Co.*,

[1901] 2 K. B. 314.

Forgery of Signature.

Assuming the signature purports to be that which the banker has been duly instructed or is otherwise authorized to honour, the question arises—is it genuine?

Here the responsibility of the banker is absolute. A cheque bearing a forged signature is not the order of his customer, and he cannot accordingly be charged with any amount paid in respect of it. The banker must therefore satisfy himself upon this point at his peril.

He may, however, acquire the right to debit his customer with the amount paid in reliance upon a cheque bearing a forged signature where the customer, after learning of the payment, has negligently failed to notify the banker of the forgery until his chance of recovering from the forger has been prejudiced, or where the payment has been ratified by his customer.

Customer's Subsequent Negligence.—Where a customer is aware of a forgery, in consequence of which his bank has debited his account with the amount of a cheque which he has not drawn, and he withholds that knowledge from the bank until its chance of recovering from the forger has been materially prejudiced, he will be estopped from relying upon the forgery and claiming to have the amount made good to him by the bank (*t*).

But where the customer has himself been first informed of the forgery by the accredited agent of the bank, and, acting honestly and with a view to what he believed to be the bank's interest, has remained silent, he will have been guilty of no wrong to the bank, and will not be estopped from setting up the forgery (*u*). Moreover, the customer will not be responsible for a failure on the part of the bank's officer to impart his information to the bank unless he had good cause to suspect that a breach of duty was contemplated by the officer and assisted in its concealment (*x*). A request made to the customer by the officer of the bank that he should keep silence would not necessarily amount to a good cause for suspicion. But if it was calculated to create in the mind of a person of ordinary intelligence a suspicion or belief that the agent,

(*t*) *M'Kenzie v. British Linen Co. and Agency Corporation*, [1896] A. C. (1881), 6 App. Cas. 82. 257.

(*u*) *Ogilvie v. West Australian Mortgage* (*x*) *Ibid.* p. 268.

or the ordinary managers of the bank's affairs, meant to betray its interests, it would be the duty of the customer to lay the whole matter before the directors for their consideration (*y*).

Ratification.—In *Coles v. Bank of England* (*z*) the executors of a stockholder sued the Bank for refusing to transfer stock of the testatrix and to pay the dividends. It appeared that nearly all the stock had been sold and transferred in the lifetime of the testatrix by her nephew C., who had brought another woman to personate her and forge her signature. After the sale the testatrix had repeatedly received the warrants for the reduced dividends in person, and had signed the warrants and the bank books, being on those occasions accompanied by C., who mentioned the amount of dividend in her presence. The jury found that she had the means of knowing of the transfer, but that there was no evidence of actual knowledge; that she had been guilty of gross negligence, and that the defendants had not been guilty of any. Upon these findings the Court held that the plaintiffs could not recover against the Bank.

This case is, however, of doubtful authority, so far as the decision turned upon the actual facts, in view of the comments upon it which are cited hereafter (*a*). Only in so far as it recognises that subsequent conduct on the part of the customer may amount to ratification of a payment made by the banker upon a forged document can it be relied upon (*b*).

(*y*) *Ogilvie v. West Australian Mortgage and Agency Corporation*, [1896] A. C. 269.

(*z*) (1839), 10 A. & E. 437.

(*a*) At pp. 280, 281.

(*b*) See pp. 200—203, *supra*, and the cases there cited, especially *Chatterton v. London and County Banking Co.* (1901), "Times," 21st January, p. 3.

CHAPTER VII.

THE ORDER TO PAY.

It will be sufficient if it is clear upon the face of the cheque what amount the drawer intends to be paid. Thus, if drawn for "Twenty-five, seventeen shillings and threepence," the cheque will be valid for 25*l.* 17*s.* 3*d.* (*a*). So, if it is drawn for "One hundred," and in the place for the figures "£100" is written, it will be good for 100*l.* (*b*). So, if the order of the words is transposed, but the meaning is evident, the cheque will be valid; for example, if it runs, "Pay John Styles seventeen or bearer pounds" (*c*).

Where the sum payable is expressed in words and also in figures, and there is a discrepancy between the two, the sum denoted by the words is the amount payable (*d*). The practice of bankers is, however, to pay the smaller amount.

A cheque may be drawn for any sum (*e*).

Forged Alterations.

After satisfying himself that the cheque presented for payment bears the genuine signature of the person entitled to draw it, the banker has still to consider whether it has been altered after its issue by the drawer and without his consent.

Alterations generally are treated in Part IV. Chap. 5. It will be sufficient here to deal with alterations of the amount directed to be paid.

(*a*) *Phipps v. Tunner* (1833), 5 C. & P. 488.

(*b*) *Rex v. Elliott* (1777), 1 Leach, C. C. 175, 179; 2 East, P. C. 951.

(*c*) *Reg. v. Bonham* (1847), 2 Cox, 189.

(*d*) Bills of Exchange Act, s. 9 (2).

(*e*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 32.

If, after exercising reasonable care, the banker fails to detect a forgery, he will usually have no right to charge his customer with the amount paid in reliance thereon.

The general rule is illustrated by *Hall v. Fuller* (f). There a cheque was altered by the holder, who substituted a larger sum for that mentioned in the cheque, but in such a manner that no person in the ordinary course of business could observe it, and the banker paid to the holder this larger sum. It was held that he could not charge the customer for anything beyond the sum for which the cheque was originally drawn.

"If," said Mr. Justice Bayley, "unfortunately he pays money belonging to the customer upon an order which is not genuine, he must suffer. To justify the payment he must show that the order is genuine, not in signature only, but in every respect. This was not a genuine order, for the customer never ordered the payment of the money mentioned in the cheque."

The banker will, however, have the right to charge his customer with the amount paid by him in reliance upon an altered cheque, and according to its apparent tenor, in consequence of the negligence of his customer.

Customer's Antecedent Negligence.—In *Young v. Grote* (g) Young had delivered to his wife certain printed cheques signed by himself, but with blanks for the sums, requesting his wife to fill up the blanks according to the exigency of his business. She caused one to be filled up by a clerk of her husband with the words "fifty pounds" and the figures "2s. 3d." The "fifty" was commenced with a small letter, and placed in the middle of a line; the figures "50 2 3" were also placed at a considerable distance from the printed "£." In this state she delivered the cheque to the clerk to receive the amount, whereupon he inserted at the beginning of the line in which the word "fifty" was written the words "three hundred and," and the figure "3" between the "£" and the "50." The alteration was made in such a manner that no person using due and ordinary diligence could have discovered that it had been made improperly, after the draft had been once filled up for another

(f) (1826), 5 B. & C. 750.

(g) (1827), 4 Bing. 253. See *Whitmore v. Wilks* (1828), 3 Car. & P. 364.

sum, and signed by the drawer. The bankers having paid the 350*l.* 2*s.* 3*d.*, it was held that the loss must fall on the customer Young. The last-cited case of *Hall v. Fuller* was distinguished.

In this connection may be cited the following observations of Lord Brougham in the case of *Kennedy v. Green* (*h*): "Had a cheque been originally written with an inch of blank to the left hand of the sum, would not all who saw it start at the risk run by the maker, and would not the maker, on his attention being drawn to it, nay, even the holder, take the precaution of drawing a line or two over the blank? But suppose a banker had discounted a cheque with a sum as 'one hundred' interlined, would any judge direct any jury to let that banker recover against the maker, though full value had by him, the banker, been paid for it? All the cases have decided the contrary, and held that every unusual circumstance is a ground of suspicion, and prescribes inquiry" (*i*).

In *Bank of Ireland v. Evans' Charities* (*k*) the facts were as follows: Trustees of a charity in Dublin, incorporated by Act of Parliament, and having a common seal, possessed stock in the public funds, which stock was registered in the Bank of Ireland. G., the secretary of the incorporated trustees, was allowed to have the seal in his possession. Five several powers of attorney, prepared in different years, sealed with the seal of the incorporated trustees, the due affixing of which seal was attested by witnesses, who (though without any fraudulent intention) attested what was not true, since the seal was affixed by the unauthorized act of the secretary alone, were presented to the bank, and the stock was transferred. The facts were afterwards discovered, and G., the secretary, was indicted and convicted. By a power of attorney duly executed, the trustees then authorized C. to transfer the stock, but the bank refused to make the transfer. An action was brought by the trustees on this refusal; the judge who tried the cause told the jury that if, under these circumstances, the trustees had so negligently conducted themselves as to contribute to the loss, the

(*h*) (1834), 3 M. & K. 699, at p. 721.

(*i*) See also *Halifax Union v. Wheel-*

wright (1875), L. R. 10 Ex. 183, cited at p. 287, *infra*.

(*k*) (1855), 5 H. L. C. 389.

verdict must be given for the bank. This direction was held to have been wrong.

Baron Parke, delivering the answer of the judges to the questions proposed by the House of Lords, said that they thought "the negligence which would deprive the plaintiff of his right to insist that the transfer was invalid must be negligence in or immediately connected with the transfer itself."

Lord Chancellor Cranworth said: "I think it has been fairly put that there must be either something that amounts to an estoppel, or something that amounts to a ratification, in order to make the negligence a good answer. Now, the case of *Young v. Grote* (l) went upon that ground (whether correctly arrived at in point of fact is immaterial), that the plaintiff there was estopped from saying that he did not sign the cheque for 350*l.*; and if the circumstances are such, whether arising from negligence or from any other cause, that, as between the customer and his banker, the customer is estopped from saying that he did not sign the cheque for a particular amount, that, as between them, is just the same as if he had signed it. Therefore, taking that view of the facts, the case may be well sustained, and appears to have been well decided. The other doctrine, that of ratification, is well illustrated by the case of *Colts and The Bank of England* (m). There the Court of Queen's Bench considered that the conduct of the owner of the stock, in subsequently signing from time to time receipts for reduced sums, when the sums had been reduced by previous forgery, was, in truth, a ratification of what had previously taken place. Whether I should have arrived upon the question of fact at the same conclusion is a matter upon which I do not feel myself called upon to speculate. That certainly seems to me to be rather a strong result. But, coming to that result, the consequence naturally and necessarily followed, whether forgery or no forgery, that if the party injured by the forgery chooses subsequently to ratify what has been done, then as between him, or her, and the person who acts upon it, the ratification would be just as good as if it had been the previous act of the party."

(l) (1827), 4 Bing. 253.

(m) (1839), 10 A. & E. 437, cited at p. 276, *supra*.

Lord Brougham added: "With respect to this case itself, I really entertain no doubt. Upon the two cases that have been referred to by the learned judges, and by my noble and learned friend, of *Young v. Grote*, and the other somewhat doubtful case of *Coles v. Bank of England* (n), I say no more, except that I agree in what the learned judges have said upon them, and also in the doubt insinuated rather than expressed by the learned judges, and more plainly intimated by my noble and learned friend, as to how the latter case might have been determined if it had not been disposed of in the way in which it was."

So in *The Mayor, &c. of Merchants of the Staple of England v. Bank of England* (o) the plaintiffs, a corporate body, had left their seal in the custody of their clerk, who, without authority, affixed it to powers of attorney, under which certain stock in the public funds, the property of the plaintiffs, was sold. The clerk appropriated the proceeds. In an action in which the plaintiffs claimed that they were entitled to the stock on the ground that it had been transferred without their authority by the defendants, it was held, on the authority of *Bank of Ireland v. Trustees of Evans' Charities* (p), that, even if the plaintiffs had been negligent, their negligence was not the proximate cause of the loss and did not disentitle them from recovering in the action (q).

In *Scholfield v. Earl of Lonsborough* (r), where it was held that the acceptor of a bill of exchange is not under a duty to take precautions against fraudulent alterations in the bill after acceptance, *Young v. Grote* was the subject of detailed comment, and the grounds given by the learned judges who decided the case were to some extent adversely criticised. But it is submitted that, as an authority upon the law of banker and customer, the decision is unshaken. Even Lord Halsbury, whose comments were more unfavourable than those of the other learned lords, said: "If, to use Lord Cranworth's phraseology, the customer by any act of his has induced the banker to act upon the document by his act or neglect of some act usual in the course of dealing between them, it

(n) (1839), 10 A. & E. 437, cited at p. 276, *supra*.

(o) (1887), 21 Q. B. D. 160.

(p) See p. 279, *supra*.

(q) See also *Bechuanaland Exploration Co. v. London Trading Bank*, [1898] 2 Q. B. 658.

(r) [1896] A. C. 514.

is quite intelligible that he should not be permitted to set up his own act or neglect to the prejudice of the banker whom he has thus misled, or by neglect permitted to be misled" (s).

It is submitted that the law upon this subject may be stated as follows: Where the amount for which a cheque has been drawn has been fraudulently altered to a larger amount, and the latter has been paid by the bank, the question whether the bank can debit their customer with the sum paid depends upon whether or not the customer has been guilty of negligence in consequence of which the banker has been misled. If the cheque has been so carelessly drawn as to expose the banker using reasonable care to the risk of paying what was not intended, and in consequence the banker has done so, the customer must bear the loss. If the bank have been negligent as well as the customer, the question will be—whose negligence was the proximate cause of the loss? (t).

Customer's Subsequent Negligence.—What has been said in the last chapter as to the effect of the customer's negligence subsequent to the payment of a cheque bearing a forged signature, and his ratification of such a payment, is equally applicable to cases of the payment of altered cheques.

(s) *Young v. Grote* was also discussed by Bigham, J., in *Union Credit Bank v. Mersey Docks and Harbour Board*, [1899] 2 Q. B. 205. Cf. also *Imperial Bank of Canada v. Bank of Hamilton*, [1903] A. C. 49.

(t) *Marcussen v. Birkbeck Bank* (1889),

5 T. L. R. 179, 463, 646, and *Journal of the Institute of Bankers*, Vol. XI. p. 403, especially the summing-up of Mathew, J., on the new trial in the latter report. See also *Bennett v. London and County Banking Co.* (1886), 2 T. L. R. 765.

CHAPTER VIII.

INDORSEMENTS.

WHERE a cheque is drawn payable to a particular person or persons, or to order (*a*), unless presented by the person or persons indicated, it is only payable if it bears an indorsement (*b*). So if, before presentation, the cheque has been indorsed to a person or persons, or to order, unless presented by him or them, it requires a further indorsement (*c*).

Accordingly, the banker, before paying a cheque requiring an indorsement, must satisfy himself that it purports to be properly indorsed. Hence arises one of the most common of the practical difficulties of his business.

The Necessary Indorsement.

The law does not furnish any adequate test of the sufficiency of an indorsement. It declares that a signature amounts to an indorsement (*d*), but omits to state what amounts to a signature, which is precisely the point which has to be determined.

Owing to the provisions hereafter considered as to forged indorsements, the main question for the banker must be—does the indorsement purport to be a signature by, or by the authority of, the person to whose order the cheque is made payable? If so, he is justified in paying the cheque.

If it really is the signature of that person, either in his own hand or written by some one else by his authority, he is bound to pay the cheque.

(*a*) As to what cheques are so payable, see Bills of Exchange Act, s. 8 (4), (5); and p. 243, *supra*.

(*b*) Bills of Exchange Act, s. 31 (3).

(*c*) *Ibid.* s. 34 (2), (3), (4).

(*d*) *Ibid.* s. 32 (1).

The following propositions with regard to an indorsement appear clear :—

It must be on the cheque (*e*). If in pencil it will suffice (*f*).

It must not be limited, that is to say, it must not purport to transfer a part only of the amount payable, or to transfer the cheque to two or more indorsees severally (*g*).

If the cheque is payable to the order of two or more persons who are not in partnership, all must indorse, unless the indorsement of one purports to be in pursuance of an authority to indorse for the others (*h*).

If the name of the person whose indorsement is necessary is wrongly designated, or his name misspelt, he may indorse as described only, or, if he think fit, in that way and also by his proper signature (*i*).

A person who has to indorse in a representative capacity may do so in such terms as to negative personal liability (*k*).

It is sufficient if the indorsement purports to be the signature of the person to whose order the cheque is payable written thereon by some other person by or under his authority (*l*). A signature by mark, if attested, would probably be sufficient (*m*).

If the indorsement of a corporation is necessary, it is sufficient if the back of the cheque is sealed with the corporate seal or purports to be signed by some duly authorized agent (*n*).

Variation in Signature.—If, then, a cheque is payable to the order of a person designated, and the signature does not correspond with the designation, it nevertheless amounts to a valid indorsement if it is the real signature of the person meant, either in his own hand or written by someone else under his authority. Thus a quite indefinite, and indeed almost infinite, range of variations is comprised, which particular examples can hardly tend to usefully illustrate.

(*e*) Bills of Exchange Act, s. 32 (1).

(*f*) *Geary v. Physic* (1826), 5 B. & C.

234.

(*g*) Bills of Exchange Act, s. 32 (2).

(*h*) *Ibid.* s. 32 (3).

(*i*) *Ibid.* s. 32 (4).

(*k*) *Ibid.* s. 31 (5).

(*l*) *Ibid.* s. 91 (1).

(*m*) *George v. Surrey* (1830), M. & M. 516; *Baker v. Dening* (1838), 8 A. & E. 94.

(*n*) Bills of Exchange Act, s. 91 (2); Companies Act, 1862, s. 47.

But, in case the indorsement is forged, it becomes material whether the banker paid the cheque in the ordinary course of business. Accordingly, the practice of bankers with regard to indorsements, although it may not affect the rights of the holder as against the drawer, may nevertheless become the test of liability as regards the banker. But it would appear very difficult to evolve any general propositions from the practice in this matter.

Delivery.—It may be observed that sect. 2 of the Bills of Exchange Act declares that “indorsement” means an indorsement completed by delivery. By reason of the provisions with regard to forged indorsements, which are now to be considered, this definition does not appear of importance in connection with the payment of cheques.

The remaining provisions of the Bills of Exchange Act as to indorsements are hereafter considered in detail in Part IV. Chap. 3. It is not thought necessary to further allude to them here.

Forged Indorsements.

A banker who pays a cheque in good faith and in the ordinary course of business, in reliance upon a forged indorsement, incurs no liability.

The Bills of Exchange Act provides—

60. When a bill payable to order on demand is drawn on a banker, and the banker on whom it is drawn pays the bill in good faith and in the ordinary course of business, it is not incumbent on the banker to show that the indorsement of the payee, or any subsequent indorsement, was made by or under the authority of the person whose indorsement it purports to be, and the banker is deemed to have paid the bill in due course, although such indorsement has been forged or made without authority.

The Stamp Act, 1853 (*o*), provides—

19. Provided always, that any draft or order drawn upon a banker for a sum of money payable to order on demand which shall, when presented for payment, purport to be indorsed by the

person to whom the same shall be drawn payable, shall be a sufficient authority to such banker to pay the amount of such draft or order to the bearer thereof; and it shall not be incumbent on such banker to prove that such indorsement, or any subsequent indorsement, was made by or under the direction or authority of the person to whom the said draft or order was or is made payable, either by the drawer or any indorser thereof.

As to bills of exchange, the first cited section is substituted for the latter; but as to other drafts and orders the latter remains operative (*p*).

Good Faith and the Ordinary Course of Business.—It will be observed that the Bills of Exchange Act introduces a condition of the protection given to the banker which is not contained in the provisions of the Stamp Act, 1853.

A thing is deemed to be done in good faith when it is in fact done honestly, whether it is done negligently or not (*q*). But in determining whether a thing is to be deemed to have been done in the ordinary course of business, it would seem that circumstances showing negligence may have to be taken into account.

Accordingly, the difference in this respect in the wording of the two sections should be borne in mind in considering the decisions upon the earlier enactment.

Scope of the Protection of the Banker.—In *Hare v. Copland* (*r*) the pleadings alleged that A., the plaintiff, drew a cheque upon a banking company requiring them to pay to S. and K., or their order, 190*l.* 17*s.* 7*d.*, the bank having at the time funds to meet the same; that P. L. forged the signature of S. and K. as an indorsement on the back of the cheque, and presented it for payment to the bank; that the indorsement was manifestly not in the writing of S. and K., or either of them, and was manifestly in the handwriting of P. L., and that the respective handwritings of S. and K. and P. L. were well known to the servants and agents of the bank at their office where the same was presented for payment by P. L.; that the bank wrongfully cashed the cheque, and

(*p*) *Capital and Counties Bank v. Gordon*, [1903] A. C. 240.

(*q*) Bills of Exchange Act, s. 90.

(*r*) (1862), 13 Ir. C. L. R. 426.

paid money of the plaintiff to the amount of 190*l.* 17*s.* 7*d.* to P. L., and that the said money was so paid to P. L. by the gross negligence of the bank. It was held that as these allegations showed that the instrument in question was a draft for money payable to order within the Stamp Act, 1853, s. 19, and that it purported to have been indorsed by S. and K., the bank was protected, and the action was not maintainable (*rr*).

In *Halifax Union v. Wheelwright* (*s*) the defendant, the salaried manager of a bank, was appointed treasurer to guardians of the poor under the Poor Law Consolidated Order. A treasurer's account between him and the guardians was duly kept according to the Poor Law Orders; moneys were from time to time paid into the bank of which he was manager to the account of the guardians; and orders signed by the guardians in conformity with the Orders were cashed like cheques payable to order. The defendant received no salary or remuneration, and the guardians received interest on their balance when it exceeded 3,000*l.* A person in the service of the clerk to the guardians, who was employed to fill up the orders for signature by them, drew a number of orders in such a way that the amounts for which they were drawn could be increased by the insertion of words and figures in the blank spaces; and after signature of the orders he increased the amounts accordingly. He also forged indorsements to orders so increased in amount, and to others not so increased, and obtained payment of them at the bank. On a case stated by an arbitrator in an action brought by the guardians against the defendant for the amount of the orders so paid, it was found as a fact that the payment by the treasurer's clerks of the excess was due solely to the fact that they were misled by want of proper caution on the part of the plaintiffs and their clerk in signing the orders fraudulently prepared for their signature. It was held, first, that the negligent drawing of the orders disentitled the plaintiffs to complain of the payment of the excess; secondly, that as to the payment on forged indorsements, the account at the bank was in effect the plaintiff's account; that the bank was protected by the Stamp Act, 1853, s. 19; and that, as by the act and direction of the plaintiffs, the only receipt of

(*rr*) Cf. *Brighton Empire and Eden Co.* (1904), "Times," 24th March, p. 13.
Syndicate v. London and County Banking (*s*) (1875), L. R. 10 Ex. 183.

moneys on their behalf was a receipt by the bank, the defendant was not chargeable in any other way than as the bank was chargeable; and, further, that if the account at the bank were regarded as the defendant's account, still being so kept by the order of the plaintiffs, they could not make any claim against him which he could not enforce against the bank.

Indorsement as Agent.—An indorsement of a cheque payable to order, purporting to be by the agent of the person to whose order it is payable, justifies the banker in paying the amount, although the person who indorsed it had in fact no authority to do so.

In *Cookson v. Bank of England* (t) a cheque drawn on the Bank of England in favour of Jackson & Co. was indorsed "*Per procuration* Jackson & Co., A. Holmes, agent," and presented and paid in the ordinary course of business. Holmes had no authority to indorse the cheque. Baron Martin directed the jury that the Bank were protected by the 16 & 17 Vict. c. 59, s. 19.

In *Charles v. Blackwell* (u) S. K., an agent of S. & Co., the plaintiffs, having authority to sell goods for them and to receive payment by cash or cheque, but not having authority to indorse cheques, received from the defendants, in payment for goods supplied, a cheque on their bankers drawn payable to S. & Co. or order. S. K. indorsed it "S. & Co., per S. K., agent," received the money from the bankers, and for the purposes of the decision in the case was assumed to have failed to account for part of it. The bankers returned the cheque to the defendants, and the amount was allowed in account by the defendants. It was held that the payment by the bankers was within the protection of 16 & 17 Vict. c. 59, s. 19; and that the plaintiffs could not maintain an action against the defendants, either for the price of the goods or for the cheque.

Cockburn, C.J., delivering the judgment of the Court of Appeal, said: "The purpose seems to have been to make the banker free of all responsibility in respect either of the genuineness or validity of the indorsement, whether purporting to be that of the payee or subsequent indorser on the one hand, or of an authorized agent on

(t) (1860), "Times" Newspaper, June 30th, p. 11; cited with approval in *Hare*

v. *Copland* (1862), 13 Ir. C. L. R. 426.

(u) (1877), 2 C. P. D. 151.

the other. . . . The cheque has been given and taken in payment. It has been paid. A portion of the proceeds has been lost to the payees, but by no default of the drawers. The cheque was paid on presentment, under circumstances which made the payment by the bankers lawful. The wrongful act by which the loss to the appellants has been brought about, was the act of their own servant. The act was done by that servant not in fraud of the drawers or their bankers but in fraud of his principals. Upon what principle, then, if the position holds good that a cheque operates as payment if paid on presentment, can it be said, after the payment of this cheque without knowledge on the part of the drawers or their drawees, that the party indorsing and presenting it was not entitled to the proceeds, that the respondents, the drawers, are bound to pay the amount a second time? . . . A cheque taken in payment remains the property of the payee only so long as it remains unpaid. When paid the banker is entitled to keep it as a voucher till his account with his customer is settled. After that, the drawer is entitled to it as a voucher between him and the payee. If the cheque was duly paid, so as to deprive the payees of a right of action, either on it or in respect of the goods in payment for which it was given, they no longer have any property in it" (x).

Payment by Crediting Customer.—A payment made by carrying the amount of the cheque to the credit of a customer paying it in is a good payment within sect. 60 of the Bills of Exchange Act (y).

Moreover, even if the cheque is crossed, a payment made by crediting the account of a customer at the branch at which it is paid in and debiting the account of a customer at another branch upon which it is drawn will be protected by the section.

This point was decided in *Gordon v. London City and Midland Bank* (z). Among the cheques which had to be considered in that

(x) See also *Halifax Union v. Wheelwright* (1875), L. R. 10 Ex. 183, cited at p. 287, *supra*.

(y) *Bissell & Co. v. Fox Brothers & Co.* (1884), 51 L. T. 663; 53 L. T. 193; cited on this point by *Stirling, L. J.*, in

Gordon v. London City and Midland Bank, [1902] 1 K. B. 242, at pp. 281-2; [1903] A. C. 240.

(z) [1902] 1 K. B. 242; *sub nom. Capital and Counties Bank v. Gordon*, [1903] A. C. 240.

case were some crossed cheques drawn on branches of the bank other than the branch at which the clerk kept his own account. The clerk stole these from the plaintiff to whose order they were made payable, forged his indorsement and paid them into his own account. These cheques were collected by the ordinary book-keeping process of debit and credit at the head office of the bank, and their amounts were placed to the credit of the clerk, who drew cheques against the same which were duly paid. The bank so dealt with the stolen cheques in good faith and in the ordinary course of business. As to these it was held that the bank were, notwithstanding the provisions of sect. 79, sub-sect. 2 of the Bills of Exchange Act, 1882, protected from liability to the plaintiff by the provisions of sect. 60 of that Act.

"The defendants," said the Master of the Rolls, "whose branch bank receives payment from another branch, are certainly a bank. It may be that the payment is to themselves; still it is a payment made to a bank, and the payment is also by a bank. That being so, I think that without too much straining of the words of the section the case may be brought within it. I think that the case for the defendants may be put alternatively in this way. Either the case is outside the legislation as to crossed cheques, which does not apply to a case where the circumstances do not admit of two banks being involved in the transaction, and so the defendants are within sect. 60; or, if the case is within sect. 79, the payment by one branch of the bank to the other satisfies the requirements of that section."

Limits of Protection.—In *Ogden v. Benas* (a) it was held that sect. 19 of the Stamp Act, 1853, did not extend to protect any other person save the drawee banker against the consequences of a forged indorsement. In that case Keating, J., said: "The plaintiff, having a payment to make to a person named Willis at Liverpool, sent him by the post a cheque for 12*l.* 12*s.* drawn upon his bankers, the London and County Bank, and made payable to Mr. Vincent Willis or order, and crossed in the usual way. The defendants are bankers at Liverpool. On the 18th of February a person who was wholly unknown to them, but who has been

(a) (1874), 9 C. P. 513.

described as a respectable-looking man, presented the cheque at their banking-house, in order that they might through their agents in London obtain the money from the bankers upon whom it was drawn, and the person so presenting the cheque indorsed it, at the request and in the presence of one of the defendants' firm, with the name of 'Vincent Willis.' He was told to call for the money on the 21st. He did call, and got the money. The defendants had in the meantime transmitted the cheque to their agents in London, the City Bank, who presented it in due course and obtained payment. It now turns out that the name 'Vincent Willis' written on the back of the cheque was a forgery; and the question is, how far 16 & 17 Vict. c. 59, s. 19, prevents the plaintiff from following his money into the hands of the persons who have obtained it by means of that forged indorsement? As against his customer, the banker paying the money would be protected; but the protection of the statute is not extended beyond him, nor does it affect the drawer's right to get back his money from one who has obtained it by means of the forged indorsement. The banker holds the money of his customer; he is bound to know the signature of his customer, but he cannot be expected to know the signatures of those persons into whose hands a cheque drawn payable to order may come; and therefore it may be right that he should be protected against a forged indorsement. The money paid by the drawees of the cheque to the correspondents of the defendants, therefore, was money of the plaintiff which the defendants had no right to receive, and consequently the plaintiff is entitled to recover it back. The suggestion that the defendants acted merely as agents for the person who was guilty of the forgery cannot alter the nature of the transaction. They could have no greater right than their principal had. . . . The case stands simply thus: The defendants have obtained the plaintiff's money from his bankers through the medium of a forged indorsement, the bankers being protected by the statute against the consequences of the forgery, but the defendants being without that protection."

So a person, other than the banker upon whom a cheque is drawn, who takes it indorsed "per procuration," does so at his

own risk. If the indorser had no authority to indorse the cheque, and was not held out by the person to whose order the cheque was payable as having such authority, the true owner will be entitled to recover the proceeds from the person who has taken and cashed the cheque. Whether a person has held out another as being authorized to indorse a cheque is a question of fact (*b*).

(*b*) *Employers' Liability Assurance Corporation v. Skipper and East* (1887), 4 T. L. R. 55.

CHAPTER IX.

NOTICES NECESSITATING DISHONOUR.

Countermand of Payment.

THE duty and authority of a banker to pay a cheque drawn on him by his customer are determined by countermand of payment (*a*).

As between the banker and his customer this subject gives rise to no difficulty in point of principle. Practical difficulties may, however, occasionally arise in determining whether a particular communication amounted to a countermand of payment, and also whether it was received in time to be acted upon, having regard to the ordinary and reasonable course of business.

Questions consequent upon the stopping of a cheque usually arise as between the drawer and the payee.

If a condition upon which a cheque is given is not fulfilled, the payee is not entitled to enforce payment of it (*b*).

So if a cheque is given on a verbal condition which the drawer finds the payee has expressed his intention to elude, the drawer has a right to stop payment of the cheque as against the payee (*c*).

But where a cheque has been given to one who takes it for value, the drawer is not entitled to stop it because events have occurred, not amounting to a failure of the consideration, but preventing him from deriving the benefit contemplated by him from the transaction in respect of which he has in reality given it.

(*a*) Bills of Exchange Act, s. 75 (1).
Cf. *Jacobs v. Morris*, [1901] 1 Ch. 261,
at pp. 269, 270; [1902] 1 Ch. 816.

(*b*) *Bevan v. Hill* (1810), 2 Camp. 381.

(*c*) *Wienholt v. Spitta* (1813), 3 Camp.
376. See also *Elliott v. Crutchley*, [1904]
1 K. B. 565.

In *Misa v. Currie* (*d*) L., then in good credit in the City, sold to M. four bills of exchange drawn by himself upon P. at Cadiz. They were sold on the 11th of February, and by the custom of bill brokers were to be paid for on the first foreign post day following the day of the sale. That first day was the 14th of February. L. was much in debt to his banker, and being pressed to reduce his balance, gave to the banker a draft or order on M. for the amount of the four bills. This draft or order was dated on the 14th, though it was in fact written on the 13th and then delivered to the banker. On the morning of the 14th the manager of M.'s business gave a cheque for the amount of the order, which was then given up to him. L. failed, and on the afternoon of the 14th the manager, learning that fact, stopped payment of the cheque. It was held that the banker was entitled to recover its amount from M.

A garnishee order having been made attaching a debt, for the amount of which at the time the order was made the garnishees had given the judgment debtor a cheque, the garnishees upon being served with the order, stopped payment of the cheque at the bank before it was presented. It was held that, upon the cheque being stopped, the position was the same as if it had never been given, and that there was therefore an existing debt capable of being attached, and that the garnishee order was effectual (*e*).

Where a cheque has been given in respect of a pre-existing debt, and the drawer is served with a garnishee order before it is paid, he is under no obligation to stop payment. If the cheque is duly paid there is nothing upon which the garnishee order can operate (*f*).

Where a debtor, who has given a cheque for his debt, receives notice that the debt has been assigned by the creditor, he is under no obligation to stop payment of the cheque (*g*). Indeed, it may be stated generally that there is no "obligation on the part of the drawer of a cheque given for value to stop the payment of it for the benefit of a third party" (*h*).

(*d*) (1876), 1 A. C. 554.

(*e*) *Cohen v. Hale* (1878), 3 Q. B. D. 371.

(*f*) *Elwell v. Jackson* (1884), C. & E. 362.

(*g*) *Bence v. Shcarman*, [1898] 2 Ch. 582.

(*h*) Per Jessel, M. R., in *Ex parte Richdale* (1882), 19 Ch. D. 409, at p. 416.

Notice of Customer's Death.

The duty and authority of a banker to pay a cheque drawn upon him are determined by notice of his customer's death (*i*).

Upon the death of one partner in a firm having an account at a banker's, the surviving partner has a right to draw cheques upon the partnership account. If the banker has no notice of the state of the accounts between the estate of the deceased partner and the surviving partner, he is under no obligation to make enquiry upon the subject (*k*).

Donatio mortis causâ.—Inasmuch as the banker's authority to pay a cheque is determined by notice of the drawer's death, a valid *donatio mortis causâ* will not be effected by the mere giving of a cheque drawn by the donor.

If the drawer of a cheque delivers it to another with the intention that the sum named in it shall become his in the event of the drawer's death, and the cheque is not actually or constructively paid or negotiated for value before the banker learns of the drawer's death, the cheque is wholly inoperative. A cheque may be constructively paid where the banker has expressly or impliedly promised the payee that he will pay it.

In *Tate v. Hilbert* (*l*) Lord Loughborough expressed the view that, if a person to whom a cheque had been given received payment of it before the banker had notice of the death of the drawer, the amount could not be recovered by the representatives of the donor (*m*).

In *In re Beaumont, Beaumont v. Ewbank* (*n*), the facts were these. On February 19th, 1901, B., who was very ill and in expectation of death, drew a cheque for 300*l.* in favour of E., to whom it was at once handed. E. indorsed the cheque, and on February 23rd it was presented for payment at B.'s bank, where his account was overdrawn. The bank manager refused payment, stating that the signature of the drawer was not like the ordinary signature of B.,

(*i*) Bills of Exchange Act, s. 75 (1).

(*l*) (1793), 2 Ves. jun. 111.

(*k*) *Backhouse v. Charlton* (1878), 8 Ch. D. 444. Cf. *Usher v. Dauncey* (1814), 4 Camp. 97.

(*m*) See also *Lawson v. Lawson* (1718), 1 P. Wms. 441; *Boutts v. Ellis* (1853) 4 De G. M. & G. 249.

(*n*) [1902] 1 Ch. 889.

and that he required some confirmation of the signature. The Court found that the manager was minded to "lend" the money to pay the cheque if he found that the signature was genuine. B. died on February 25th, 1901, without the cheque having been cashed. Under these circumstances it was held that there had not been a valid *donatio mortis causâ*.

In the course of his judgment, Mr. Justice Buckley said: "A *donatio mortis causâ* is a singular form of gift. It may be said to be of an amphibious nature, being a gift which is neither entirely *inter vivos* nor testamentary. It is an act *inter vivos* by which the donee is to have the absolute title to the subject of the gift, not at once, but if the donor dies. If the donor dies the title becomes absolute, not under, but as against his executor. In order to make the gift valid it must be made so as to take complete effect on the donor's death. The Court must find that the donor intended it to be absolute if he died, but he need not actually say so. . . . The following have been held good subjects of donation: (a) A promissory note payable to the deceased's order, but not indorsed: *Veal v. Veal* (o). (b) Bills of exchange in favour of the deceased or his order: *Rankin v. Weguelin* (p). (c) Bills of exchange payable to order and which had not been indorsed: *In re Mead* (q). (d) A cheque payable to the donor's order and not indorsed: *Clement v. Cheesman* (r). (e) A banker's deposit note: *In re Dillon* (s). In none of these cases had the donee got the complete title, but he had obtained the *indicia* of title before the donor's death, and as against the legal personal representative he could say, 'Lend me your name, or give me your indorsement, in order that I may complete my title. There is a trust in my favour.' But how does the case stand where the deceased's own cheque is handed over? A man's cheque in favour of another person is not an equitable assignment of any part of the donor's balance at his bankers: *Hopkinson v. Forster* (t): The cheque is only a revocable

(o) (1859), 27 Beav. 303; 29 L. J. Ch. 321; 6 Jur. N. S. 527.

(p) (1832), 27 Beav. 309. From the report in 29 L. J. Ch. 325, n., it appears that the bills were not indorsed.

(q) (1880), 15 Ch. D. 651. This case was distinguished in *In re Dillon*, see note (s), *infra*.

(r) (1884), 27 Ch. D. 631.

(s) (1890), 44 Ch. D. 76.

(t) (1874), 19 Eq. 74; 23 W. R. 301.

mandate, which may be stopped in the donor's lifetime and is revoked by his death. If, before the donor's death, the cheque is presented and paid, there is no question of *donatio mortis causâ* of the cheque, although there may be a question whether the money has been received on the terms that it shall only be retained in case of the donor's death. If the cheque is not presented in the donor's lifetime the gift is ineffectual; the cheque is a revocable order which is revoked by the donor's death: *Hewitt v. Kaye* (u); *In re Beak's Estate* (x). In the last case I have referred to there was the additional fact that the delivery of the cheque was accompanied by delivery of the banker's pass-book. The pass-book may be said to be the banker's acknowledgment of a debt due to his customer, but Bacon, V.-C., held that the delivery of the pass-book was no further evidence to establish the *donatio mortis causâ* than the cheque was. . . . In all the cases, in order that the gift may be valid, it must, I think, be shown that the donor handed over either property, or the *indicia* of title to property, which belonged to him. His own cheque is not property; it is only a revocable order, such that if the banker acts on it the donee will have the money to which it relates. Even without actual payment of the cheque there may be a good gift—for instance, if there is an undertaking by the banker to the donee to hold the amount of the cheque for the latter, that may be enough. Unless there is that, or something equivalent to it, there is no delivery of property, but only a delivery of that which, if acted on, will procure the delivery of property. . . . All the authorities seem to be consistent with the view that where the cheque is not actually or constructively paid there is no valid *donatio mortis causâ*. . . . The case is not within *Bromley v. Brunton* (y); there could not be an equitable assignment of funds at the bank, for the deceased had no funds there. If the manager was minded to lend, there was no contract binding him to do so. There was no consideration for any contract, and if the cheque had come back with the signature confirmed, and the manager had in the meantime changed his mind, he need not have paid. No right

(u) (1868), 6 Eq. 198.

(x) (1872), 13 Eq. 489.

(y) (1868), 6 Eq. 275.

had been acquired by the donee, but an expectation only. Even if the manager did not change his mind, still an agreement to lend is not enforceable, and no right of property had passed to the donee. I hold, therefore, that in this case there was no valid *donatio mortis causá*. The mere drawing of the cheque and handing it to the donee, coupled with the subsequent facts, did not amount to such a *traditio* as was required in order to give the donee a right to the amount of the cheque on the death of the donor. Even if the account had been in credit the donee would not, I think, have obtained any right to the property. If a cheque were given by a donor who was dangerously ill, and the donee went to a branch of the bank in the country and asked for payment, and the manager said, 'The cash is locked up for the night; come tomorrow, and I will pay you,' and the drawer died in the night, it might very well be that then there was an appropriation by the undertaking to answer the cheque and a good *donatio mortis causá*. But the facts of the present case do not come up to that supposed state of facts. There was no promise to pay in the case before me; and if there is a promise not to pay but only to lend, that is not sufficient."

In *Bromley v. Brunton* (z) a cheque had been given by A. to B., and presented without delay. The bankers had sufficient assets of A., but refused payment because they doubted the signature, which was written very badly, the surname being repeated under the first signature. The next day A. died, the cheque not having been paid. It was held that there had been a complete gift, *inter vivos*, of the amount of the cheque, the effect of the cheque being to appropriate so much of the donor's money.

It is possible that this decision may be supported on the ground indicated by Mr. Justice Buckley in his judgment in *In re Beaumont, Beaumont v. Ewbank* (a), where he says: "Stuart, V.-C., held that there was a complete gift *inter vivos* of the amount of the cheque. He must have so decided either because the cheque was constructively paid, the bankers having substantially said that they would pay, so that the payment constructively related back to the date of presentation; or because the bankers had in effect

(z) See last note.

(a) See p. 295, *supra*.

said, 'The account is in credit, and we will hold enough of the balance to satisfy the cheque subject to the signature being shown to be genuine,' and therefore that there was a good equitable assignment. The Vice-Chancellor says: 'The effect of the cheque was to appropriate so much of the donor's money, and my opinion is that the funds, the subject of the gift, are in the hands of the executors just as much liable to the payment of the cheque as they were in the hands of the bankers.' I cannot suppose that he meant that the cheque by itself operated as an equitable assignment of money at the bank. Probably he meant that the effect of the cheque, coupled with the banker's action on it, was to appropriate enough of the money at the bank to meet the cheque; that the bankers, so to speak, constructively honoured the cheque."

In *Rolls v. Pearce* (b) a cheque drawn by a testator payable to his wife or her order, given to her shortly before his death, was indorsed by her and paid into a foreign bank, against the amount of which she drew, but the cheque was not presented for payment at the bank on which it was drawn till after the death of the testator. Vice-Chancellor Malins held that there had been a good *donatio mortis causâ* (c).

Notice of Customer's Insanity.

If the fact of the insanity is brought to the knowledge of the banker, although no proceedings in lunacy have been taken, the banker will honour any cheque of the customer at his own risk (d).

Notice of Customer's Bankruptcy.

After a receiving order has been made against the customer, or after the banker has received notice of an available act of bankruptcy (e) committed by him, the banker must not honour cheques

(b) (1877), 5 Ch. D. 730.

(c) This case does not appear to have been considered in *In re Beaumont, Beaumont v. Ewbank*, cited at p. 295, *supra*. Cf. *Boutts v. Ellis* (1853), 4 De G. M. & G. 249.—Upon the subject of *donatio mortis causâ* see also *In re Dillon, Duffin v. Duffin* (1890), 44 Ch. D. 76 (a case of a deposit receipt), cited in Part

VI. Chap. 3; and *Mustapha v. Wedlake*, W. N. (1891) 201.

(d) See the judgments in *Drew v. Nunn* (1879), 4 Q. B. D. 661; 48 L. J. Q. B. 591.

(e) See Bankruptcy Act, 1883, ss. 9, 49, 168. See *Ex parte Snowball*, *In re Douglas* (1872), 7 Ch. 534, at p. 549; *Ex parte Halliday*, *In re Liebert* (1873), 8 Ch. 283.

drawn upon his account. If he pays a cheque, the trustee in bankruptcy can compel him to account for the amount to himself (*f*).

Winding-up of Company.

The effect of the winding-up of a company customer has been already dealt with at pages 38 and 231.

Notice of Assignment.

If before the presentation of a cheque the banker receives a true notice of an assignment by his customer of the balance standing to his credit, he will apparently be bound to dishonour the cheque (*g*).

Notice of Intended Breach of Trust.

Although it is not the duty of the banker to make enquiry as to the manner in which his customer has obtained the money which he pays in to his account (*h*), or as to the purpose for which he has drawn a cheque (*i*); yet, if the banker knows that moneys credited to his customer represent trust moneys, he must not honour a cheque which he is aware is drawn by his customer for the purpose of committing a breach of trust (*k*).

In *Hunt v. Manière* (*l*) Sir John Romilly, M. R., in the course of his judgment, said: "Suppose this: A sum of 1,000*l.* being deposited at a banker's in the name of a mere trustee, a person applies to the bankers saying, 'This is a trust fund belonging to me which the trustee is going to misapply; I am about to apply for an injunction, therefore do not part with the money in the meantime'; afterwards the bankers refuse to pay it to the trustee, and subsequently notice of an injunction is given to the bankers. Can the trustee bring an action against the bankers for the damage he

(*f*) *Vernon v. Hankey* (1787), 2 T. R. 113. See also *In re Montague, Ex parte Ward*, cited at p. 136, *supra*.

(*g*) See *Walker v. Bradford Old Bank* (1884), 12 Q. B. D. 511, cited at p. 232, *supra*; and Part VIII. Chap. 7, Sect. 7.

(*h*) Per Lord Herschell in *Thomson v. Clydesdale Bank*, [1893] A. C. 282.

(*i*) Per Lord Blackburn in *Brooks & Co. v. Blackburn Benefit Society* (1884), 9 A. C. 857, 864.

(*k*) See Part II. Chap. 3.

(*l*) (1864), 34 Beav. 157.

has sustained by being prevented from committing a breach of trust? If that be law, it certainly is not equity."

But a mere notice from a third party that he claims the balance standing to the customer's credit will not justify the banker in dishonouring a cheque (*m*).

Service of Garnishee Order.

If a banker is served with a garnishee order in respect of the amount standing to the credit of his customer's account, he need not, and should not, honour any cheque subsequently presented. It is immaterial whether or not the balance due to the customer exceeds the amount of the judgment debt.

In *Rogers v. Whiteley* (*n*) a garnishee order *nisi* was made attaching "all debts owing or accruing due" from a banker to a judgment debtor who was his customer. The banker, at the time when the order was served, had in his hands moneys belonging to the judgment debtor exceeding the amount of the judgment debt. In consequence, however, of the order, the banker refused to honour cheques drawn by the customer upon the balance between the amount of the judgment debt and the amount standing to the credit of the judgment debtor. Thereupon he sued the banker in respect of such refusal. It was held by the House of Lords that the garnishee order attached the whole of the moneys, and that the banker was right in dishonouring the cheques, and accordingly that no action lay against him (*o*).

No payment but a payment made by compulsion of law, can discharge a garnishee from his original liability to his creditor (*p*).

The process against a garnishee, to enforce obedience to the jurisdiction of the Lord Mayor's Court in foreign attachment, is personal, and cannot be applied to a corporation aggregate. Where, therefore, a banking company registered under the Companies Acts was cited as garnishee, to appear in the Lord Mayor's Court, it was held entitled to maintain prohibition (*p*).

(*m*) See *Tassell v. Cooper*, cited at 527, cited in Part VIII. Chap. 7, p. 224, *supra*. Sect. 7.

(*n*) [1892] A. C. 118.

(*p*) *Mayor and Aldermen of the City of London v. London Joint Stock Bank* (1881),

(*o*) Cf. *Yates v. Terry*, [1902] 1 K. B. 6 A. C. 393.

Injunction.

If a banker has notice of an injunction restraining his customer from drawing cheques he will be bound to dishonour any cheque drawn in disregard of the injunction (q).

The limitations upon the power to restrain a banker by injunction from honouring his customer's cheques may be gathered from the case of *Fontaine-Besson v. Parr's Banking Company and Alliance Bank, Ltd.* (r). There Mr. Justice Lawrance had granted an interim injunction restraining the defendants from honouring drafts drawn by Mrs. F.-B. against a letter of credit for 11,150*l.* The action was by the plaintiff, a French subject, to recover 11,150*l.* deposited with the defendants by his wife, the plaintiff alleging that his wife had stolen certain bonds belonging to him, which she had converted into this money. When the wife deposited the money with the defendants they gave her a letter of credit authorizing her to draw upon them up to the amount of 11,150*l.* It appeared that the plaintiff was now prosecuting his wife for larceny. The wife was not a party to the action.

On appeal the injunction was dissolved. Lord Esher, M. R., said that there was no authority or power to make this order. In the first place it might do irreparable injury to the bank, and in the second place it would be interfering between the bank and its customer without the customer being before the Court. Kay, L. J., added that, even if the plaintiff's wife were before the Court, the only order that could be made would be to restrain her from drawing drafts, and not to restrain the bank from honouring drafts already drawn. The injunction was altogether wrong.

Sequestration.

Where a sequestration has been issued against a customer, his balance at his banker's may be attached under it, and the Court has jurisdiction to order the banker to verify and pay the balance to the sequestration account (s).

(q) See *Seaward v. Paterson*, [1897] 1 Ch. 545.

(r) (1895), 12 T. L. R. 121.

(s) *Miller v. Huddleston* (1882), 22 Ch. D. 233.

But a writ of sequestration does not in itself create a charge, and mere notice of its issue against a customer does not bind the balance to his credit in the hands of the banker (*t*).

Writ of Extent.

An extent in chief may be issued against a banker in respect of Crown moneys which to his knowledge have been paid into the account of a customer (*u*), or for recovery of interest on such an account (*x*).

(*t*) *In re Pollard, Pollard v. Pollard*,
W. N. (1902) 144. Cf. *In re Pollard*,
Ex parte Pollard, [1903] 2 K. B. 41.

to the case next referred to, at p. 301 of
the report.

(*x*) *Reg. v. Adams* (1848), 2 Exch.

(*u*) *Rex v. Ward* (1836), cited in a note 299.

CHAPTER X.

PAYMENT OF CHEQUES.

Assuming that the banker is satisfied that the document presented is in order, that is to say, that, in its then condition, it is the cheque of his customer, and, if payable to order, that it purports to be properly indorsed; and, further, that no notice has been received by the banker showing that he is not at the time authorized to pay it, the question remains—Can he safely pay it to the person who presents it?

The Holder.

If that person is the holder, that is to say, the payee, indorsee, or bearer of the cheque (according to the manner in which it is drawn or indorsed), a payment to him by the banker in good faith and without notice that his title is defective, will be a payment in due course (*a*). As such, it will entitle the banker to charge his customer with the amount.

Payee.—When a cheque is made payable to a particular person (and not to bearer), the banker can only safely pay it to a person whom he is satisfied is the payee, or to a person who presents the cheque bearing an indorsement purporting to be that of the payee. Such cheques are in practice always required to be indorsed.

Indorsee.—In the case of a cheque drawn payable to order the banker must be satisfied that it purports to have been negotiated, that is to say, to bear the indorsement of the proper person.

The subject of indorsements has been dealt with in Chap. 8 of this Part.

(*a*) Bills of Exchange Act, s. 59 (1), and s. 2.

Bearer.—A cheque is payable to bearer which is expressed to be so payable, or on which the only or last indorsement is an indorsement in blank (*b*).

When the payee is a fictitious or non-existing person the cheque may be treated as payable to bearer (*c*).

This is so although the drawer believed and intended the cheque to be payable to the order of a real person. Thus, in *Clutton v. Attenborough & Son* (*d*), a clerk in the account department of the appellants, by fraudulently representing to them that work had been done on their account by B., induced them to draw cheques payable to the order of B. in payment for the pretended work. There was, in fact, no such person as B. The cheques, when signed by the appellants, were sent by them to the account department for postage. The clerk obtained possession of the cheques, indorsed them in B.'s name, and negotiated them with the respondents, who gave value for them in good faith. The cheques were paid to the respondents by the appellants' bankers. The appellants, having discovered the fraud, brought an action against the respondents to recover the amount of the cheques as money paid under a mistake of fact. It was held that B. was a "fictitious or non-existing person" within sect. 7, sub-sect. 3, of the Bills of Exchange Act, 1882, although the appellants believed and intended the cheques to be payable to the order of a real person; that the cheques might therefore be treated as payable to bearer, and that the action could not be maintained, the respondents being holders in good faith for value (*e*).

A cheque drawn "Pay to Ship Fortune or bearer" is payable to "bearer" simply (*f*).

"Bearer" means the person in possession of a cheque which is payable to bearer (*g*).

(*b*) Bills of Exchange Act, s. 8 (3).

(*c*) *Ibid.* s. 7 (3).

(*d*) [1897] A. C. 90.

(*e*) See also *Bank of England v. Vagliano Brothers*, [1891] A. C. 107, cited in Part IV. Chap. 4; and *Edinburgh*

Ballarat Gold Co. v. Sydney (1891), 7 T. L. R. 656.

(*f*) *Grant v. Vaughan* (1764), 3 Burr. 1516.

(*g*) Bills of Exchange Act, ss. 2, 31 (2).

The Customer's Balance.

If, at the time when the cheque is presented, a sum not less than that for which it is drawn is standing to the credit of the customer on his current account, or, having regard to the agreement or course of business prevailing between the banker and the customer, ought to be so standing, and such sum is at the disposal of the customer, the banker is bound to honour the cheque, but not otherwise. For this purpose the banker is not bound to take into consideration a balance in favour of the customer on his account at an office other than that upon which the cheque is drawn, but he is entitled to take into consideration a balance against the customer on such an account.

The rules governing this subject are discussed at pages 84 and 195.

If, in the absence of a sufficient balance, the banker chooses to honour a cheque, he can, of course, charge its amount against his customer.

That the banker should pay his customer's cheques in the order of their presentment obviously follows from the nature of his obligation to honour cheques.

Time for Payment.

Payment need only be made if the cheque is presented upon a business day within banking hours (*h*).

Sundays, Good Friday, Easter Monday, Whit Monday, the first Monday in August, Christmas Day, the 26th of December, if a week day, and, if not, the 27th of December, are not business days (*i*).

The usual banking hours in London, of which the Courts take judicial notice (*k*), are nine till four, except on Saturday, when they are nine till one. But Government cheques are not payable at the Bank of England after 3 p.m. (*l*). The banking hours in a country place should, apparently, be proved in any action where they are material (*m*).

Where a draft has been dishonoured for insufficiency of assets, and afterwards the banker receives a payment in sufficient to meet

(*h*) *Parker v. Gordon* (1806), 7 East, 385; *Elford v. Teed* (1813), 1 M. & S. 28; *Jameson v. Swinton* (1810), 2 Taunt. 224; *Wilkins v. Jadis* (1831), 2 B. & Ad. 188.

(*i*) See pp. 101-2, *supra*.

(*k*) *Parker v. Gordon*, see note (*h*), *supra*.

(*l*) 4 & 5 Will. 4, c. 15, s. 21.

(*m*) *Hare v. Henty* (1861), 10 C. B. N. S. 65.

it, and then the draft is again presented after business hours, the banker is not bound to meet it upon that day (*n*).

Delay Pending Enquiry.—"If the order be couched in any very peculiar and unwonted shape, and bear upon its face such marks of peculiarity as naturally to cast upon it a high degree of suspicion in the minds of the bank officers, it seems only just that they should have time to assure themselves of its regularity" (*o*).

Form of Payment.

The holder may insist upon receiving payment in a form constituting a legal tender. Gold coins of the realm, or made at the mints of Sydney, Melbourne, or Perth (Western Australia), are available to any amount; Bank of England notes are available for all sums above 5*l*., except at the Bank of England or its branches; silver coins of the realm are available up to 40 shillings, and bronze coins of the realm up to a shilling (*p*).

Although a holder of a cheque has the right to be paid in the way indicated, only a small proportion of the total value of the cheques presented is actually so paid. By virtue of the elaborate system of presentment of drafts through head offices and agents, and of the clearing system, payment is for the most part effected, to the satisfaction of those concerned, by an exchange of debit and credit memoranda culminating in entries in the books of the Bankers' Bank.

Payment at the Counter.

As soon as the money or notes have been received from the cashier by the person presenting a cheque, the payment is irrevocable so far as concerns the passing of the property in that which is actually handed over. If the cashier has placed coins or documents

(*n*) *Whitaker v. Bank of England* (1835), 1 C. M. & R. 744.

(*o*) *Morse's Law of Banking* (American), 4th ed. pp. 659-60. See also Part IV. Chap. 9.

(*p*) The Coinage Act (33 & 34 Vict. c. 10), s. 4; Proclamation of 17th Sept. 1900, as to Sydney Mint: Stat. Rules and Ord. 1900, p. 25; Proclamation of

same date as to Melbourne Mint, *ibid.* p. 21; Order in Council of 13th Oct. 1897, as to Perth Mint: Stat. Rules and Ord. 1897, p. 18. See also the earlier Proclamations of 3rd Feb. 1866, as to Sydney Mint, and 7th Aug. 1869, as to Melbourne Mint (issued under 26 & 27 Vict. c. 74): Stat. Rules and Ord. Rev. Vol. I. pp. 615, 618.

on the counter, at the moment when the person presenting the cheque has put his hand upon them, or any of them, the property passes.

In *Chambers v. Miller* (q) the plaintiff, on behalf of his employer, had presented a cheque at the defendants' banking-house. The cashier counted out the amount in notes, gold, and silver, and placed it on the counter. The plaintiff took it and counted it, and was in the act of counting it a second time when the cashier, having discovered that the drawer's account was overdrawn, demanded the money back, and upon the plaintiff's refusal to comply, detained him and took it from him by force. In an action for assault and false imprisonment, it was held that the property in the notes and money had passed from the bankers to the bearer of the cheque, and that the payment was complete and could not be revoked, and accordingly that the defendants' plea of justification failed.

"With regard to cheques," said Chief Justice Erle, "the well-known course of business is this: When a cheque is presented at the counter of a banker, the banker has authority on the part of his customer to pay the amount therein specified on his account. The money in the banker's hands is his own money. On presentation of the cheque, it is for the banker to consider whether the state of the account between him and his customer will justify him in passing the property in the money to the holder of the cheque. In this case, the bankers' clerk had gone through that process, and so far as in him lay did that which would pass the property in the money to the plaintiff. He counted out the notes and gold and placed them on the counter for the plaintiff to take up. It no longer remained a matter of choice or discretion with him whether he would pay the cheque or not. The plaintiff had taken possession of the money, counted it once, and was in the act of counting it again, when the clerk, who had gone from the counter, finding that there was a mistake, not as between him and the bearer of the cheque, but as between him and the customer, returned and claimed to revoke the act of payment which on his part was already complete, and claimed to have the money back. Now, the bankers had parted with the money, and the plaintiff had accepted it. It is true, he had not finished counting it, and that, if he had

found a note too much or a note short, there was still time to rectify the mistake. But, according to the intention of the parties, and the course of business, the money had ceased to be the money of the bankers, and had become that of the party presenting the cheque. It was the clear opinion of the jury that the property passed; and equally clear am I, if it was a question of law for me, that the bankers did by that which took place pass the property in the money to the holder of the cheque. On that ground I am of opinion that the plaintiff is entitled to retain his verdict. That which passed amounted to payment of the cheque; and the plaintiff was entitled to retain the money. Some of the cases which were cited might be applicable if the customer had obtained by mistake from the banker money to which he was not entitled. In *Kelly v. Solari* (r) the administratrix was not entitled to receive the money. The policy under which the payment had been made to her was a lapsed policy, and the money was paid under a mistake of fact. That being so, and it being against all equity and good conscience that she should retain it, the money was held to be recoverable back. But, as between the parties here, there was no manner of mistake. The bankers' clerk chose to pay the cheque; and the moment the person presenting the cheque put his hand upon the money it became irrevocably his."

Assent to Retracting.—If the person presenting the cheque after payment is complete acquiesces in its retraction, the situation will be the same as if payment had not been made.

In *London Banking Corporation v. Horsnail and others* (s) one of the defendants, named Hayward, who was sued as the acceptor of a bill of exchange, pleaded that an indorser, named Cooper, had paid the bill. Cooper had handed to the plaintiffs a cheque on his account with the London and County Bank (Croydon branch) for the amount due on the bill, at the same time advising his bankers that he had done so. The plaintiffs' clerk presented the cheque, and received in exchange a form of "banker's payment," signed by the cashier and manager. When the clerk was about to leave the bank, the cashier asked that the document might be returned, as there had been a mistake, and this was accordingly done. Probably

(r) (1841), 9 M. & W. 54.

(s) (1898), 14 T. L. R. 236.

the fact of Cooper's arrest had been discovered. No advice of the "banker's payment" had been sent to the head office.

Mr. Justice Bigham, in giving judgment, said that what took place at the Croydon branch of the bank amounted, in his view, to a payment of the cheque in law. But he found as a fact that Cooper knew that his cheque had been treated as a non-paid cheque, and, in his opinion, from the time when he ascertained that, the plaintiffs remained, with his assent, holders for value of the bill. Being holders for value, and the acceptor not having paid, the plaintiffs were entitled to sue the defendant.

Recovery of Money Paid.

The circumstances under which a banker who has paid money in reliance upon a forgery can recover from the person to whom he has paid it are considered in Part IV. Chap. 9.

The Clearing System (t).

The practice followed with regard to clearing cheques in London was stated in *Boddington v. Schlenker* (u) as follows: "The clearing-house at which the bankers' clerks meet to exchange their cheques is in Lombard Street. . . . The practice is, that each banker sends to the clearing-house the cheques upon other bankers which he receives in the course of the day; they are there delivered to a clerk of the firm on which they are drawn (each house having a clerk in attendance there for the purpose), and he enters them in a book to the credit of the bankers paying them in. When the clock at the clearing-house strikes four (x), no more cheques are taken; and at the end of the day the clerks settle their balances. If a cheque comes too late for the clearing-house, it is usually sent to the bankers' on whom it is drawn, and they mark it with their initials, which is considered an undertaking to pay it the next day, it not being usual for bankers to pay each other after four. The

(t) The principles of the clearing system are explained with conspicuous lucidity in Jevons on Money, Chaps. 20 and 21.

(u) (1833), 4 B. & Ad. 752, at p. 754.

(x) At the present day the clearing-house does not shut its doors until 10 minutes past 4, in order to allow cheques taken in at 4 to be cleared.

defendant gave evidence for the purpose of showing that, by an established usage in that business, a banker receiving a cheque upon another was bound to pass it at the clearing-house the same day if there were time; and that, under the circumstances of this case, Martin, Stone & Co. had time to clear the cheque in question. On this point it was stated that a cheque paid in at the banker's, and requiring to be cleared, must be entered in two books at least before it is sent out; it has then to go to the clearing-house and to be there entered in a third. If Martin & Co. had had only a single cheque to clear, it would have been in time though paid in as late as seven minutes before four; but Mr. Stone stated that on the 26th of March, 1831, they had ninety-one cheques paid in shortly before and after four o'clock, including the cheque on Bond & Co., and that all of these were too late to be cleared. The question when a cheque should be considered as too late or in time to be cleared did not appear to be settled by any positive rule."

In *Warwick v. Rogers* (y) the special verdict stated that the clearing-house "is a room situate in the City of London, generally used by the bankers of London and Westminster for the purpose of facilitating the receipts and payments between themselves. The manner of presenting and receiving and passing bills, notes, and cheques at the clearing-house is as follows: The clerks from the different banking-houses using the clearing-house assemble there daily at eleven o'clock in the forenoon, and remain, or go backwards and forwards, as the case may be, until half-past five, when the clearing-house is closed. Each banker has a separate drawer, into which drawer all bills, notes, and cheques then due, and which are payable at such banker's, are put by the other respective bankers' clerks holding the same on arrival at eleven o'clock, and so from time to time through the day. Up to four o'clock (but not later) bills, notes, and cheques are put into the drawer as they arrive. Shortly after eleven o'clock the clearing clerk of each banker takes out of his drawer all the bills, notes, and cheques which have been then put into it by other bankers' clerks claiming payment, and takes or sends the same to his principal's banking-

house, in order that the banker may examine them and determine as to the payment of them respectively; and the same course is pursued again at three o'clock in the afternoon, and from time to time afterwards during the remainder of the day until four o'clock. Each banker examines the bills and cheques so sent or taken to him by their respective clerks, and the customers' accounts to which they refer; and such bills or cheques as are at the time intended to be paid, are cancelled by drawing lines along and across the name of the party for whom such payment is intended to be made. Such of the bills and cheques as the bankers determine not to pay, are returned by them to and deposited in the drawer at the clearing-house of the bankers by whom the same were that morning brought to the clearing-house. Sometimes this is done when the clerk returns at three o'clock to the clearing-house, and sometimes the bankers (if they so please) retain them until three minutes before five o'clock, and then return and deposit them in the said drawer: and all bills not so returned and deposited by the last-mentioned time are considered by the respective bankers as paid, the claims of the several bankers on each other being settled at five o'clock, and the final balance between them then struck, though each banker's clerk makes up his account from time to time during the day, as may suit his convenience, until five o'clock, correcting it by the addition of such subsequent receipts and payments as may be necessary according to the items which afterwards come in. When a cancellation has occurred through error or mistake, the same has been indicated in writing on the bill, note, or cheque returned."

The practice described above appears to have continued in its essential particulars down to the present time (z).

In this connection, it will be convenient to set forth the existing rules as issued by the authority of the Committee of the Clearing-House.

(z) *E.g.*, it is still the practice for a clearing banker to hold a draft until 5 p.m. before intimating to the presenting banker whether or not it will be

honoured. If it has been cancelled in the meantime, it is returned marked "cancelled in error" and initialled.

RULES AND REGULATIONS TO BE OBSERVED AT
THE CLEARING HOUSE.

(October, 1902.)

ORDINARY DAYS, EXCEPTING SATURDAYS.

Morning clearing to open at 10.30 a.m. Drafts, &c., to be received not later than 11 a.m.

Afternoon clearing to open at 2.30 p.m. Drafts, &c., to be received not later than 4.5 p.m. Returns to be received not later than 5 p.m., excepting on settling days and the first six working days in January and July, when the last delivery shall be 4.15 p.m. and returns 5.30 p.m.

SATURDAYS.

Morning clearing to open at 9 a.m. Drafts, &c., to be received not later than 10.15 a.m.

Afternoon clearing to open at 12 noon. Drafts, &c., to be received not later than 1.30 p.m. Returns to be received not later than 2.30 p.m.

Exceptions.—With the exception of the first two Saturdays in January and July, and the first Saturday in April and October, when the time shall be 1.45 p.m. for the last delivery and 2.45 p.m. for returns.

Further Exceptions for Returns.—Returns on the first Saturday in January and July to be not later than 3 p.m.

APRIL 1ST, JUNE 30TH, OCTOBER 1ST, DECEMBER 31ST, THE DAY SUCCEEDING A BANK HOLIDAY, AND ON SUCH OTHER DAYS AS THE HONORARY SECRETARY MAY DETERMINE.

On these days the time shall be 4.15 p.m. for the last delivery, and 5.15 p.m. for the last returns, except when either of these days is a Saturday, when the time shall be 1.45 p.m. for last delivery and 2.45 p.m. for the last returns.

GENERAL RULES.

The total amount of the morning and country delivery shall be agreed by each clearer before leaving the Clearing House.

All clerks that are in the Clearing House by the time appointed for final delivery, shall be entitled to deliver their articles, though they may not have been able to pass them to the different desks before the clock strikes.

All returns in the Clearing House upon the stroke of the clock, at

the time appointed for final delivery, must be received by the clearers and credited the same day. The inspectors are instructed to close the doors and not re-open them until such returns have been delivered.

Any bank which has accepted and paid an article returned to it in error, may require repayment through the Clearing House on the following day.

Notice shall be entered upon a board at the Clearing House, giving monthly statements of those settling days at the Stock Exchange, upon which the time for receiving returns is to be 5.30 p.m.

With regard to all drafts not crossed, and all bills not receipted, sent to the Clearing House as returns, the clearer holding them must fully announce the particulars to the Clearing House, and if not claimed, the case must be represented to the inspectors; but on no account can the clearer be allowed to debit the Clearing House with the amount until an owner can be found.

No return can be received without an answer in writing on the return why payment is refused.

It shall be sufficient in order that a return shall be received and credited, that it shall have on it an answer, why returned; and no clearer shall refuse to pass to credit any return that shall be so marked.

All the differences arising from marked articles of 1,000*l.* and upwards must be finally ascertained and placed to account, before the clearer makes up his balance sheet.

No clearer shall be allowed to charge out drafts in the clearing-out book at the Clearing House.

All differences of more than 1,000*l.* that may have been accidentally passed over at night, shall be settled by a transfer at the Bank of England, the first thing the next morning.

The inspectors are charged with the preservation of order and decorum in the Clearing House, and are instructed to report to the Committee of Bankers disorderly conduct on the part of any persons, calculated, in their opinion, to obstruct the adjustment of the business of the house.

RULES FOR THE CONDUCT OF A
CLEARING OF COUNTRY CHEQUES
IN LONDON.

(June 27th, 1893.)

1. A clearing to be held in the middle of each day for the interchange, among the London bankers, of cheques on their correspondents in the country, placed in their hands for collection.

2. Each London banker to remit for collection to his country corres-

pondents the cheques drawn upon them, saying, "Please say if we may debit you £ for cheques enclosed."

3. Country bankers wishing to avail themselves of this clearing to remit their country cheques to their own London agent, to stamp across them *their own name and address, and that of their London agent.*

4. Any country bank not intending to pay a cheque sent to it for collection, to return it direct to the country or *branch bank*, if any, whose name and address is across it.

5. Each country banker to write by return of post to its London agent in reply, "We credit you £ for cheques forwarded to us for collection in yours of ." Adding in case of non-payment of any such cheques, "having deducted £ for cheque returned to Messrs. at , and £ returned to Messrs. at ."

The inspectors respectfully point out the necessity of exact adherence to the above rules.

ADDITIONAL RULES.

(February 6th, 1902.)

Country clearing to open at 10.30. Drafts, including returns, to be received not later than 12.30, except on Saturdays, when the time shall be 10 o'clock for the opening, and 11.30 for the last delivery, including returns. The door to be closed on the stroke of the clock, as in the town clearing.

(It is required that all banks shall make a delivery as near to 10.30 as possible, on ordinary days, and 10 o'clock on Saturdays. In no case shall the first delivery be later than 10.45 on ordinary days, and 10.30 on Saturdays. The remaining deliveries at necessary intervals.)

All the in-clearing to be entered at the Clearing House.

Castings of about 50 entries to be given with all the early deliveries of the out-clearing.

(It is expected that the last castings will be given to the in-clearers not later than 5 minutes after the last delivery of cheques.)

All charges to be agreed at the Clearing House on the day of the work, and the clerk responsible for the out-side shall make it his business to go to the desk of the clerk entering his charge on the inside for this purpose.

It shall be necessary for the in-clearer to retain for the inspection of the out-clearer, the cheques of any casting, or any particular cheque in which a difference occurs.

All wrongly delivered cheques discovered before the out and in-clearers agreeing any charge have left the Clearing House, shall be adjusted by the clearers, but any discovered after either clearer has left the house shall not be deducted from the already agreed amount,

but shall be entered on the debit side of lists provided for the purpose, the cheque or cheques to be sent to the proper forwarding agent, who shall also enter them on the credit side of the list provided; these lists to be handed to the Clearing House inspector on the morning following, and it shall be his duty to agree the same. The total of these lists to be brought on to the end of the balance sheet.

The balance sheet, together with the particulars of the out and insides, shall be handed to the inspector on the morning following the day of the work, and it shall be his duty to check the balances, and to call attention to any charge that may differ, as soon as possible.

Cancellation in Error.—In *Warwick v. Rogers* (a) A. was the holder of a foreign bill drawn upon B. in England, and accepted by B., payable at the banking-house of C. On the morning when the bill became due, D., as A.'s banker, took the bill to the clearing-house in London, and put it into C.'s drawer. C., having examined the bill, and having funds of B.'s in his hands at the time, cancelled the acceptance by drawing lines across B.'s name, without rendering the acceptance illegible. In the course of the day, B., finding himself to be insolvent, ordered C. not to pay the bill, whereupon C. wrote thereon, "Cancelled by mistake—orders not to pay." The bill was returned in this state to D. at the clearing-house before the settling hour. It was the usage to cancel bills intended to be paid as C. had done, and where a cancellation had occurred through mistake, to indicate the same by writing on the bill. It was held by the Court of Common Pleas that no legal liability had been cast upon C. from which a promise could be inferred that he would pay the amount of the bill or return it without having cancelled or destroyed the acceptance; that the duty cast upon him was no more than to take due care of the bill, and, if he did not choose to pay it, to return it uncanceled, unless it had been cancelled by mistake, and in that case to indicate the same by writing on the bill; that C. did use due care to prevent the acceptance from being defaced, and that the acceptance was an acceptance defaced and cancelled in point of fact, but that it was an acceptance cancelled by mistake. It was also held that, upon the above-mentioned facts, A. could not sue C. for money had and received. The Court further expressed the opinion that a banker

(a) (1843), 5 M. & G. 340.

who omits to return or defaces a bill is not, in all cases, under an obligation to pay the amount; but if he do so wrongfully, he becomes liable to an action for damages if the holder has sustained damage by his breach of duty.

Warwick v. Rogers was approved in *Prince v. Oriental Bank Corporation* (b), where it was held that the mere fact of cancelling the signature of the makers of a dishonoured promissory note and writing "paid" on the note, corrected before the note is sent back to the plaintiffs by a memorandum thereon "cancelled in error," cannot be effectual to charge the bank with the receipt of the money. There a promissory note had been returned dishonoured to the plaintiffs, the amount thereof having been transmitted by transfer drafts and entries in the bank's books from the branch where the same was made payable to the branch where the plaintiffs paid the same in (the transfer and entries not having been communicated to the plaintiffs).

Return of Country Cheques.—In *Parr's Bank v. Thomas Ashby & Co.* (c) the plaintiffs sued the defendants, who are bankers at Staines, to recover 307*l.* It appeared that one Tom Frost, in September, 1897, formed his business into a limited liability company. In October, 1897, the defendants took two debentures over the whole assets of the company to secure an overdraft. On October 30th, 1897, Frost paid into the Kensington branch of the plaintiff bank, which is treated as a "country bank" for the purposes of the question raised in the action, a cheque for 307*l.*, drawn by Tom Frost & Co., Ltd., upon the defendant bank, and payable to the order of Tom Frost & Co., Ltd. This cheque was then stamped with the name of the plaintiff bank and sent by them to their head office in London. On Monday, November 1st, this cheque was handed by the plaintiffs' clerk at the clearing-house at noon to the clerk of Williams, Deacon & Co., the London agents of the defendants, and was by them sent on, along with other cheques, to the defendants, with a form to the effect that Williams, Deacon & Co. enclosed country clearing cheques value

(b) (1878), 3 A. C. 325; 47 L. J. P. C. 42; 38 L. T. 41; 26 W. R. 543. See also *Fernandey v. Glynn* (1807), 1 Camp.

426, note, and pp. 83-4, *supra*.

(c) (1898), 14 T. L. R. 563.

2,825*l.* 13*s.* 11*d.* for favour of payment, and requesting them to return by first post the slip at foot, after inserting the amount to be debited in account. This slip was filled up and returned by the defendants on November 2nd. By it the defendants requested Williams, Deacon & Co. to debit their account with an amount which included the cheque for 307*l.* The defendants did not send back the cheque to the plaintiffs' Kensington branch on November 2nd, but held it during that day. On the 3rd, at 10.50 a.m., before the country clearing, Williams, Deacon & Co. received a telegram from the defendants asking them to "pay yesterday's country clearing 307*l.* less than advised," and adding, "cheque returned to Parr's, Kensington." At 3.30 p.m. the defendants, after certain negotiations, made up their minds not to pay the cheque, and at 4.5 p.m. on the same day it was returned to Parr's Bank at Kensington with a notice that it would not be paid. At the country clearing at noon on the 3rd, the plaintiffs' clerk, having received the defendants' telegram, handed to the clerk of Williams, Deacon & Co. a note requesting them to debit the plaintiffs for cheque returned to Kensington by the Staines bank, and to credit Williams, Deacon & Co. with the sum of 307*l.* On the 3rd the plaintiffs' Kensington branch honoured an acceptance of Tom Frost payable at that branch for 65*l.* The Kensington manager stated that he would not have honoured the draft if the cheque had been returned on that morning. The Bankers' Clearing-House Rules of June, 1893, so far as material, were read in the course of the case.

Mr. Justice Bigham said that, although the cheque for 307*l.* was placed to the credit of Frost on October 30th at the plaintiffs' Kensington branch, it was not so placed to his credit as to entitle him to draw against it. If the defendants did not intend to pay that cheque they ought to have returned it, in the ordinary course of business and under rule 4 of the Clearing-House Rules, to Parr's Bank at Kensington by return of post on November 2nd, with an intimation that it would not be paid. The defendants did not fulfil that duty. They spent November 2nd with Mr. Frost trying to see if they could get from him sufficient funds to meet the cheque. Meantime, they allowed the cheque to be dishonoured at the country clearing-house, but took no steps to inform Parr's Bank at Kensington. The consequence was that on the morning

when the cheque should have come back, the Kensington branch treated it as though it were paid, which they were justified in doing, and met an acceptance of Frost's for 65*l.*, which they would not have done if they had known that the cheque had been dishonoured. The practice was for one country bank which received a cheque from another country bank which it did not intend to pay to return the cheque by return of post to the bank into which it had been paid. The defendants had not observed that practice, and they must have known what the result would be. The plaintiffs had acted upon the faith of the representation made by the defendants when they met Frost's draft for 65*l.* There was a representation that the cheque for 307*l.* was a paid cheque, and a representation that would lead the plaintiffs to act upon it, and they had acted upon it. Judgment was accordingly given for the plaintiffs for 65*l.*, and it was directed that the defendants were to have the benefit of any right of proof which the plaintiffs might have against the estate of Frost.

Provincial Clearing-Houses.—Clearing-houses have been established in Manchester, Leeds, Newcastle-on-Tyne, Birmingham, Bristol and Liverpool, as well as in Scotland and Ireland.

Payment by Transfer at Bank of England.—The principles governing payments as between bankers where a mature system of clearing has not been established, but an arrangement with a similar object has been effected by the bankers of a particular place with the local branch of the Bank of England, are illustrated by the case of *Pollard v. Bank of England* (*d*).

There it appeared that, before the establishment of the local clearing-house (*e*), the bankers at Newcastle-on-Tyne had accounts at the branch bank there of the defendants, the Bank of England; and it was the practice that each banker, having previously ascertained that the bills, cheques, &c. on the other banks would be paid, handed them to the defendants for collection; and they accordingly, at 2 p.m., presented the bills, &c. to the drawees, and a cheque was drawn upon the defendants for the aggregate amount, which was then placed to the debit of the drawee's account

(*d*) (1871), L. R. 6 Q. B. 623.

(*e*) The Newcastle-on-Tyne clearing-house was opened in 1872.

with the defendants. If the defendants were themselves the holders of a bill, it was presented earlier in the morning to ascertain whether it would be paid, and if so, it was left with the drawee, and a credit note was given in exchange, and afterwards, upon the presenting of the cheques, &c., this credit note was taken into the account, and formed part of the sum for which the cheque on the defendants was given. The banks closed to the public at 3 p.m., but the bankers' accounts with the defendants' branch were kept open till 4; and between those hours the bankers attended for the purpose of having the day's accounts between them and the defendants investigated, and of rectifying any mistakes and errors of any kind that might have arisen, and of finding and striking the final balance between them; and all mistakes and errors made in the course of the day were subject to correction during that investigation. The plaintiffs had an account with the defendants' branch bank, and the defendants discounted for them a bill, accepted payable at the house of L. & Co. (one of the bankers at Newcastle-on-Tyne), of which the plaintiffs were the payees and indorsers. On the morning of the day when the bill became due, the defendants' clerk took the bill to L. & Co., and it was marked by them for payment, and a credit-note was given to the defendants including the amount of the bill. About 2 p.m. the same day, the defendants' clerk took all the cheques drawn on L. & Co. and the credit-note to L. & Co., and they handed to the defendants' clerk a cheque for the aggregate amount. After the closing of L. & Co.'s bank on the same day, the clerk, who had given the credit-note including the bill, ascertained from the ledger-keeper that the acceptor had not a balance sufficient to meet the bill, and it was also further ascertained that he had stopped payment. Thereupon, at 3.30 p.m., L. & Co.'s out-teller requested the defendants to take back the bill. This the defendants did under protest. At this time the defendants had already placed the amount of the bill to the debit of L. & Co. in their account with the defendants. Neither the plaintiffs nor the defendants sustained any damage from the mistake of L. & Co. It was held that the plaintiffs were entitled to have credit with the defendants for the amount of the bill, as there was nothing in the facts or practice to show that the payment of the bill by L. & Co. under

the circumstances was merely provisional, and subject to revocation provided notice was given before the final closing of the accounts at four o'clock.

In delivering the judgment of the Court Mr. Justice Blackburn said: "Bankers in London, for the sake of economy of cash payments, have established a clearing-house, the details of the practice of which (so far at least as was material to the point then in question) are stated in the special verdict in *Warwick v. Rogers* (f). The number of bankers and the quantity of business in Newcastle are far less than in London, and apparently are not sufficient to make it worth their while to have such an elaborate arrangement; but many of the objects of the clearing-house are effected by an arrangement (described in the case) by which all the Newcastle bankers have accounts at the branch Bank of England there, and use it as the means of making all payments between each other. . . . After the banks had closed to the public, which is at three o'clock, Messrs. Lambton, for the first time, ascertained that the acceptors of the bill had stopped payment, and that the balance at their credit with them was not sufficient to meet this bill. Of course, if they had known earlier that they had stopped payment, they would never have done what they did, and if what they had done was still revocable, they would have revoked it. They immediately gave notice to the branch bank that they had paid the bill in error, and required them to take it back. This was done before four o'clock, but after their account was already debited with the amount in the accounts of the Bank of England. The question in the cause is, whether they still had the right to do this. If the bill was already paid they clearly had not. If what took place amounted to no more than an arrangement amongst the bankers by which, for convenience' sake, they at three o'clock stated the account of what they at that time intended to pay at the later hour of four, but only provisionally, so that the intention was revocable up to the time of actual payment, it would be otherwise; and if, instead of giving a cheque for the amount, the banker had given a credit-note, expressing that their account was to be debited provisionally with this amount, but subject to alteration and revo-

(f) See pp. 311—312, *supra*.

cation at their pleasure up to a later hour, it would have clearly indicated that there was such an arrangement. But a cheque given purports to be, *prima facie*, an absolute payment, and it would require very strong evidence to show that it was not so. . . . The matter may, therefore, be shortly put thus: The bill having been presented by the defendants at Lambton & Co.'s, a cheque on the defendants themselves was given by Lambton & Co., who had funds in the defendants' hands to cover the amount. Thereupon, unless the giving the cheque was provisional and subject to ratification in going over the accounts later in the day, it became the duty of the defendants at once to transfer the amount of the bill from the account of Lambton & Co. to that of the plaintiffs; and this they, in effect, did. Such a transaction might, no doubt, by arrangement between the bankers, be provisional only, and subject to be set aside; but it is for the defendants to show that such an arrangement existed, in order to divest the transaction of what would otherwise be its necessary effect. This the defendants have failed to do; and our judgment must, therefore, be for the plaintiffs."

Payment of Crossed Cheques.

This is now regulated by the Bills of Exchange Act.

79.—(1.) Where a cheque is crossed specially to more than one banker, except when crossed to an agent for collection, being a banker, the banker on whom it is drawn shall refuse payment thereof.

(2.) Where the banker on whom a cheque is drawn which is so crossed nevertheless pays the same, or pays a cheque crossed generally otherwise than to a banker, or if crossed specially otherwise than to the banker to whom it is crossed, or his agent for collection, being a banker, he is liable to the true owner of the cheque for any loss he may sustain owing to the cheque having been so paid. Provided that where a cheque is presented for payment, which does not at the time of presentment appear to be crossed, or to have had a crossing which has been obliterated, or to have been added to or altered otherwise than as authorized by this Act, the banker paying the cheque, in good faith and without negligence, shall not be responsible or incur any liability, nor shall the payment be questioned, by reason of the cheque having been crossed, or of

the crossing having been obliterated, or having been added to or altered otherwise than as authorized by this Act, and of payment having been made otherwise than to a banker or to the banker to whom the cheque is or was crossed, or to his agent for collection, being a banker, as the case may be.

In *Bobbett v. Pinkett (g)*, which was decided before the passing of the Bills of Exchange Act, 1882, the plaintiff drew a cheque on his bankers, M. & Co., payable to order, crossed it "L. & C. Bank," and sent it for value to the payee, from whom it was stolen, and his indorsement was forged. It was ultimately passed to the defendant, who took it *bonâ fide* in ignorance of the forgery. The defendant gave it to his country bankers, and their London agents, the L. and J. Bank, presented and received payment for it from M. & Co., who either did not perceive or disregarded the crossing "L. & C. Bank." On hearing it was paid the defendant gave value for it to a customer. Meanwhile the plaintiff, at the payee's request, had sent him a second cheque for the same amount, which also was paid by M. & Co., and the plaintiff's account was debited with both cheques. The plaintiff having brought an action for the amount of the first cheque, for money had and received by the defendant, the jury found that all the parties concerned, except the defendant, namely, the plaintiff, M. & Co., and the payee, had been guilty of negligence with regard to the payment of the first cheque. It was held that the first cheque had been paid by M. & Co. improperly and without authority, because they had paid it to the wrong bankers, and that the plaintiff could maintain this action against the defendant, who had acquired no title to the cheque.

In such circumstances, since the Act was passed, the payee, as the true owner of the cheque, would have a remedy against the bankers for the loss sustained by him owing to the cheque having been so paid (*h*).

Payment of a crossed cheque made by crediting the account of a customer at the branch at which it is paid in and debiting the

(*g*) (1876), 1 Exch. D. 368.

London (1875), 1 Q. B. D. 31, for the position before the Act of a payee who had indorsed and crossed a cheque which was afterwards stolen.

(*h*) Chalmers' Bills of Exchange, 6th ed. p. 261. See *Smith v. Union Bank of*

account of a customer at another branch upon which it is drawn is protected under sect. 60 of the Bills of Exchange Act (*i*).

80. Where the banker on whom a crossed cheque is drawn, in good faith and without negligence pays it, if crossed generally, to a banker, and if crossed specially, to the banker to whom it is crossed, or his agent for collection being a banker, the banker paying the cheque, and, if the cheque has come into the hands of the payee, the drawer, shall respectively be entitled to the same rights and be placed in the same position as if payment of the cheque had been made to the true owner thereof (*k*).

81. Where a person takes a crossed cheque which bears on it the words "not negotiable," he shall not have and shall not be capable of giving a better title to the cheque than that which the person from whom he took it had (*l*).

Cashed Cheques.

When a cheque has been cashed it is the property of the customer; and as soon as he has in any way accepted it as a voucher for its amount in favour of the banker, for example, by returning his pass-book after its amount has been entered therein, he is entitled to have the cheque handed over to him.

"A cheque taken in payment remains the property of the payee only so long as it remains unpaid. When paid the banker is entitled to keep it as a voucher till his account with his customer is settled. After that, the drawer is entitled to it as a voucher between him and the payee" (*m*).

Accordingly notice to a party to an action to produce a cheque drawn by him and paid by his banker, is sufficient to entitle the party serving the notice to give secondary evidence of the contents of the cheque if it is not produced, even although it is in fact in the banker's hands (*n*). A clerk of the banker need not be called to produce it (*o*).

(*i*) See p. 289, *supra*.

(*k*) As to recovery by the customer or the payee of the amount paid in the case of a forged indorsement, see *Ogden v. Benas* referred to at pp. 290—291, *supra*.

(*l*) See p. 247, *supra*.

(*m*) Per Cockburn, C. J., in *Charles v. Blackwell* (1877), 2 C. P. D. 151, at

p. 162.

(*n*) *Burton v. Payne* (1827), 2 C. & P. 520; *Partridge v. Coates* (1824), R. & M. 153, at p. 156; 1 C. & P. 534. See also the observations of Wilde, C. J., in *Reg. v. Watts* (1850), 2 Den. C. C. 14, at p. 21; 4 Cox, C. C. 336; 19 L. J. M. C. 14.

(*o*) *Ibid*.

“Cheques,” said Abbott, L. C. J. (*p*), “are generally returned to the customers, but if not, while in the hands of the banker, they must be considered in the possession of the customer; the banker is his agent.”

A cancelled cheque is *primâ facie* evidence of a payment of a debt, and not of a loan to the customer, by the banker (*q*).

(*p*) In *Partridge v. Coates* (1824), R. 3 Esp. 196; *Cary v. Gerrish* (1801), & M. 153, at p. 156 of the report. 4 Esp. 9; *Aubert v. Walsh* (1812),

(*q*) *Fletcher v. Manning* (1844), 12 M. 4 Taunt. 293. See also pp. 254—255, & W. 571. Cf. *Egg v. Barnett* (1800), *supra*.

CHAPTER XI.

CONSEQUENCES OF WRONGFUL DISHONOUR.

THE circumstances under which a banker is bound to honour the cheque of his customer have been considered in Chaps. 1 to 9 of this part, and payment has been discussed in the last chapter. It remains to consider the consequences of dishonour.

Measure of Damages.

Where the banker, being bound to honour his customer's cheque, has failed to do so he will be liable in damages. If special damage naturally ensuing from the dishonour is proved, it will be properly taken into account in assessing the amount of the damages. If the customer be a trader, the jury may properly award substantial damages, in the absence of the proof of special damage. In other cases the customer will be entitled to such damages as will reasonably compensate him for the injury which, from the nature of the case, he has sustained.

All loss flowing naturally from the dishonour of a cheque may be taken into account in estimating the damages (*a*).

In *Rolin v. Steward* (*b*), which was an action against a banker for refusing to pay a trader's cheque, he having had at the time of refusal sufficient assets of the trader, the jury were told to give "not nominal, nor excessive, but reasonable and temperate damages." On application for a new trial, the Court of Common Pleas held that this direction was right.

"It cannot," said Mr. Justice Williams, "be denied that, if a

(*a*) See *Boyd v. Fitt* (1862), 14 Ir. C. L. R. N. S. 43; 11 L. T. 280. It is

conceived that *Morris & Co. v. London and Westminster Bank* (1885), C. & E. 498; 1 T. L. R. 360, is not a case of authority.

(*b*) (1854), 23 L. J. C. P. 148; 14 C. B. 595; 2 C. L. R. 959; 18 Jur. 536.

customer, not a trader, bring an action like the present and allege and prove special damage, the jury may give substantial damages. In like manner, since the dishonouring cheques is particularly calculated to be injurious to a person in trade, if it be alleged and proved that the plaintiff is a trader, the jury may take that fact into their consideration in estimating their damages, and they are not confined to the actual damage proved: on the same principle as that on which it is held that to impute insolvency to a trader is actionable without proof of special damage."

"Although no evidence is given that the plaintiff has sustained any special damage, the jury ought not to limit their verdict to nominal damages, but should give such temperate damages as they may judge to be a reasonable compensation for the injury the plaintiff must have sustained from the dishonour of his cheque" (c).

For further authorities upon this subject reference should be made to the cases cited at pages 144—147.

Position of Payee.

A cheque in itself is merely a request to the banker to pay a certain sum. It does not purport to be, and has not the effect of, an assignment to the payee of money in the hands of the banker. Nor is it accepted by the banker like a bill of exchange. Accordingly, the payee has in general no right of action for its dishonour against the banker on whom it is drawn (d). His only remedy if it is dishonoured is against the drawer or an indorser.

The banker may, of course, render himself directly liable to the holder by expressly or impliedly agreeing with him to pay its amount. In this connection reference should be made to Part IV. Chap. 8 (e).

And if the banker induces another banker or any other person to give credit to his customer by representing expressly or impliedly that he intends to honour his cheque, and afterwards fails to do so, he will be liable for any loss sustained in consequence by such banker or other person (f).

(c) Byles on Bills, 16th ed. p. 20.

(d) See pp. 249—250, *supra*.

(e) See also the judgment of Lord

Denman, C. J., in *Boyd v. Emmerson* (1834), 2 A. & E. 184.

(f) See p. 317, *supra*.

CHAPTER XII.

CRIMES RELATING TO CHEQUES.

CRIMES on the part of bankers and banking officials are dealt with in Part I. Chap. 9.

It will be convenient in this place to advert to the principal classes of offences relating to cheques, viz., forgery, obtaining by false pretences, and larceny or stealing.

Forgery.

Forgery at common law is "the fraudulent making or alteration of a writing to the prejudice of another man's right" (a).

The following provisions of the Forgery Act, 1861 (24 & 25 Vict. c. 98), apply to cheques:—

22. Whosoever shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any bill of exchange, or any acceptance, indorsement or assignment of any bill of exchange, or any promissory note for the payment of money, or any indorsement or assignment of any such promissory note, with intent to defraud, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for life. . . .

23. Whosoever shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any undertaking, warrant, order, authority, or request for the payment of money, or for the delivery or transfer of any goods or chattels, or of any note, bill, or other security for the payment of money, or for procuring or giving credit, or any indorsement on or assignment of any such undertaking, warrant, order, authority, or request, or any accountable receipt, acquittance, or receipt for money or for goods, or for any note, bill, or other

(a) Blackstone's Commentaries, Vol. 4, 247; *Reg. v. Riley*, [1896] 1 Q. B. 309.

security for the payment of money, or any indorsement on or assignment of any such accountable receipt, with intent, in any of the cases aforesaid, to defraud, shall be guilty of felony, and being convicted thereof shall be liable to be kept in penal servitude for life. . . .

24. Whosoever, with intent to defraud, shall draw, make, sign, accept, or indorse any bill of exchange or promissory note, or any undertaking, warrant, order, authority, or request, for the payment of money, or for the delivery or transfer of goods or chattels, or of any bill, note, or other security for money, by procuration or otherwise, for, in the name, or on the account of any other person, without lawful authority or excuse, or shall offer, utter, dispose of, or put off any such bill, note, undertaking, warrant, order, authority, or request so drawn, made, signed, accepted, or indorsed by procuration or otherwise without lawful authority or excuse as aforesaid, knowing the same to have been so drawn, made, signed, accepted, or indorsed as aforesaid, shall be guilty of felony, and being convicted thereof shall be liable to be kept in penal servitude for any term not exceeding fourteen years(b).

25. Whenever any cheque or draft on any banker shall be crossed with the name of a banker, or with two transverse lines with the words "and company," or any abbreviation thereof, whosoever shall obliterate, add to, or alter any such crossing, or shall offer, utter, dispose of, or put off any cheque or draft whereon any such obliteration, addition, or alteration has been made, knowing the same to have been made with intent, in any of the cases aforesaid, to defraud, shall be guilty of felony, and being convicted thereof shall be liable to be kept in penal servitude for life(c).

The Revenue Act, 1883 (46 & 47 Vict. c. 55), extends the foregoing as follows:—

17. Sects. 76 to 82, both inclusive, of the Bills of Exchange Act, 1882, and sect. 25 of the Forgery Act, 1861, shall extend to any document issued by a customer of any banker, and intended to enable any person or body corporate to obtain payment from such banker of the sum mentioned in such document, and shall so extend in like manner as if the said document were a cheque. Provided that nothing in this Act shall be deemed to render any such document a negotiable instrument. For the

(b) See also sect. 39.

(c) See 43 & 44 Vict. c. 33, ss. 3 and 4, as to Post Office Orders, and 38 & 39

Vict. c. 83, s. 32, as to crossed coupons of local loan debenture stock.

purpose of this section Her Majesty's Paymaster-General and the Queen's and Lord Treasurer's Remembrancer in Scotland shall be deemed to be bankers, and the public officers drawing on them shall be deemed customers.

A cheque is both a bill of exchange and an order for the payment of money, and is accordingly within both sect. 22 and sect. 23, as well as sect. 24, of the Forgery Act.

Form of Forgery.—In order to support an indictment for forgery it is not necessary that the document which purports to be a warrant or order for the payment of money should be addressed to any particular person. It is sufficient that if genuine it would have been a voucher for the payment of the money mentioned in it (*d*).

A post-dated cheque is a warrant or order for the payment of money (*e*).

In *Reg. v. Lee* (*f*) the prisoner had forged the signatures of the chairman and committee of a society to a cheque, which required for its validity their signatures and that of the clerk, with the object and result of obtaining the signature of the clerk. He was held to have committed forgery.

Forging and uttering an indorsement on a cheque with a view to get it cashed by the credit of the name will support a conviction for forgery even though the cheque was valid (*g*).

The dividend warrant or cheque of a railway company, signed by the secretary and addressed to their bankers, directed the latter to pay to A., a shareholder, or his order a certain amount. There was a memorandum at the bottom of the document: "The shareholder's name must be indorsed at the back of the cheque." It was held that a person who forged the shareholder's indorsement on the cheque was guilty of forging an order or warrant for the payment of money (*h*).

(*d*) *Reg. v. Rogers* (1839), 9 C. & P. 41. Cf. *Reg. v. Snelling* (1853), 23 L. J. M. C. 8; *Dears. C. C.* 219; 2 C. L. R. 114; 6 Cox, 230; 17 Jur. 1012.

(*e*) *Rex v. Willoughby* (1783), 2 East, P. C. 944.

(*f*) (1848), 3 Cox, 80. Cf. *Reg. v. Turpin* (1849), 2 C. & K. 820.

(*g*) *Reg. v. Wardell* (1862), 3 F. & F. 82.

(*h*) *Reg. v. Antey* (1857), 26 L. J. M. C. 190; D. & B. C. C. 294; 7 Cox, 329; 3 Jur. N. S. 697.

If a person having authority to fill up a cheque for a certain sum fills it up for a larger sum, he commits forgery (*i*).

So the filling up a cheque signed in blank without authority, although for a sum due from the person who has signed it to the person who fills it up, may be forgery (*k*).

The Pretended Drawer.—It is immaterial that the supposed drawer has no account with the banker upon whom the cheque is drawn.

In *Rex v. Lockett* (*l*) a forged order on a banker for the payment of money purporting to be made by one who kept an account with him was held to be a warrant or order within the 7 Geo. 2, c. 22, though made in a fictitious name, or in the name of one who had no authority to draw on him (*m*).

In *Reg. v. Vivian* (*n*) the prisoner, on the 25th May, 1844, uttered a forged paper in the following form: "Mr. Martin will be pleased to send by the bearer 10*l*. on Mr. Hodge's account, as Mr. Hodge is very bad in bed, and cannot come himself.—Martin. Ralph, Foreman, St. Austell Foundry." Martin was clerk to Coode & Co., bankers, with whom John Hodge kept an account. Hodge was ill in bed on the day in question, which was a Saturday and his usual pay-day. It was the duty of Ralph, his foreman, to pay Hodge's labourers, but he had no general authority to draw for money, although Hodge had adopted a cheque which he had drawn in the preceding January. The cheque in question was not drawn by or with the authority of Ralph. The cheque was paid, although it did not appear how Hodge's account stood at the time. The prisoner was convicted of uttering, and the verdict was upheld by the fifteen judges.

Coleridge, J., in pronouncing sentence, said: "Any instrument for payment under which, if genuine, the payer may recover the amount against the party signing it may properly be

(*i*) *Rex v. Hart* (1836), 7 C. & P. 652; 1 Moo. C. C. 486; *Reg. v. Bateman* (1845), 1 Cox, 186; *Reg. v. Wilson* (1848), 17 L. J. M. C. 82; 2 C. & K. 527; 1 Den. C. C. 284.

(*k*) Per Wilde, L. C. J., in *Flower v.*

Shaw (1848), 2 C. & K. 703.

(*l*) (1772), 2 East, P. C. 940; 1 Leach, C. C. 94.

(*m*) See also *Reg. v. Carter* (1844), 1 C. & K. 741; 1 Den. C. C. 65.

(*n*) (1844), 1 C. & K. 719.

considered a warrant for the payment of money, and it is equally this, whatever be the state of the account between the parties, and whether the party signing it has, at the time, funds in the hands of the party to whom it is addressed or not. This case may be said to be removed one step further than the ordinary one, where the name of the actual accountant is forged, because Ralph had himself no account with Messrs. Coode & Co.; but by this instrument, if genuine, Ralph says, in effect, that he had authority from Mr. Hodge, who had an account with them; as against him, therefore, it is as much warrant as if he himself had had such account, and would have equally bound him. The difference in the fact, therefore, is immaterial in principle."

In *Rex v. Backler* (o) the prisoner took a document purporting to be drawn by G. Andrewes on Jones, Lloyd & Co. in favour of — Newman, Esq., or bearer, to one Blackwell. The prisoner asked Blackwell to give him change for it for Mr. Newman, of Soho Square, in whose service he stated that he had been for six months. He also said that Mr. Newman had put his name on the cheque. It appeared that the name on the document was not in Newman's handwriting, and that the prisoner had never been in his service, and that no person named G. Andrewes kept any account at the banking-house. Parke, J., after consulting Gaselee, J., held that this was sufficient *prima facie* evidence that G. Andrewes was a fictitious person, and the prisoner was convicted of uttering.

In *Rex v. Brannan* (p) the prisoner was indicted for forging and uttering a cheque purporting to be drawn in the name of John Weston on Messrs. Cox, Greenwood & Co., army agents and bankers. A clerk of the latter swore that there was not any person of the name of John Weston having any account there, and that the cheque was presented to him and payment refused. He admitted that he could not swear that he knew the names of all the customers of his firm, but said that he did not know of anyone of the name of John Weston in the army agent department, in which he was employed, and that he had inquired of the other clerks, and was informed by them that there was no such person in the banking department. Parke and Patteson, JJ., and Gurney, B.,

(o) (1831), 5 C. & P. 118.

(p) (1834), 6 C. & P. 326.

held that this was sufficient *prima facie* evidence. The prisoner called no evidence and was convicted.

The Drawee.—In *Rex v. Crowther* (q) a document purporting to be a cheque drawn on the Worcester Old Bank by a person who kept no account there was presented for payment by the prisoner at Messrs. Rufford's bank at Stourbridge, and payment was refused. It was held that this was sufficient evidence of an intent to defraud Messrs. Rufford, and that the prisoner could be convicted of forgery.

In *Rex v. Watts* (r) the prisoner purchased wheat of the prosecutors, agreeing to pay by the acceptance of a London banker. He drew a bill on Williams & Co., bankers, of Birchin Lane, London. Whilst he was drawing it one of the prosecutors asked him if Williams & Co. were Williams, Burgess & Co., and he answered that they were. There were London bankers at No. 20, Birchin Lane of the name of Williams, Burgess & Co., who usually accepted bills in the name of Williams & Co. This bill was not accepted by that firm. No other bankers of the name of Williams & Co. were known to carry on business in Birchin Lane, nor were there any other London bankers of that name. The words "Williams & Co." were on a brass plate on the door of No. 3. There was no evidence to show by whom the bill was accepted. It was held by ten judges against one that the prisoner could not be convicted of forgery.

Conditional Uttering.—Where a person gave a forged acceptance, knowing it to be such, to the manager of a banking company with whom he kept an account, saying that he hoped this would satisfy the bank as security for the debt he owed, and the manager replied that that would depend on the result of enquiries respecting the acceptors, it was held that this was an uttering (s).

False Pretences.

The crime of obtaining by false pretences is now defined by the following sections of the Larceny Act, 1861 (24 & 25 Vict. c. 96):—

88. Whosoever shall by any false pretence obtain from any

(q) (1832), 5 C. & P. 316.

(r) (1821), 3 B. & B. 197.

(s) *Reg. v. Cooke* (1838), 8 C. & P. 582.

other person any chattel, money, or valuable security (*t*), with intent to defraud, shall be guilty of a misdemeanour, and being convicted thereof shall be liable . . . to be kept in penal servitude . . . or to be imprisoned . . .

Provided, that if upon the trial of any person indicted for such misdemeanour it shall be proved that he obtained the property in question in any such manner as to amount in law to larceny, he shall not by reason thereof be entitled to be acquitted of such misdemeanour; and no person tried for such misdemeanour shall be liable to be afterwards prosecuted for larceny upon the same facts:

Provided also, that it shall be sufficient in any indictment for obtaining or attempting to obtain any such property by false pretences to allege that the party accused did the act with intent to defraud, without alleging an intent to defraud any particular person, and without alleging any ownership of the chattel, money, or valuable security; and on the trial of any such indictment it shall not be necessary to prove an intent to defraud any particular person, but it shall be sufficient to prove that the party accused did the act charged with an intent to defraud.

89. Whosoever shall by any false pretence cause or procure any money to be paid, or any chattel or valuable security to be delivered to any other person, for the use or benefit or on account of the person making such false pretence, or of any other person, with intent to defraud, shall be deemed to have obtained such money, chattel, or valuable security within the meaning of the last preceding section (*u*).

Passing Worthless Cheque.—To obtain goods by fraudulently giving in payment a cheque upon a banker in whose hands the drawer has no funds to meet it, and which he knows will not be paid, is indictable as obtaining by false pretences (*x*).

But if the drawer of a cheque believed that, if presented at an agreed time, it would be met, he cannot be convicted of false pretences in respect to it (*y*).

(*t*) For the definition of this term, see p. 339, *infra*.

(*u*) See also sects. 48 and 90 of this Act; *Reg. v. John* (1875), 13 Cox, 100; *Reg. v. Gordon* (1889), 23 Q. B. D. 354; 58 L. J. M. C. 117; and the Summary Jurisdiction Act, 1899 (62 & 63 Vict. c. 22), s. 3, as to the meaning of a false

pretence.

(*x*) *Rex v. Jackson* (1813), 3 Camp. 370. Cf. *Reg. v. Martin* (1879), 5 Q. B. D. 34; *Reg. v. Garratt* (1893), 10 T. L. R. 167.

(*y*) *Reg. v. Walne* (1870), 11 Cox, 647; 23 L. T. 748.

In *Reg. v. Hazelton* (z) the prisoner was indicted for obtaining goods by (amongst others) the false pretence that certain cheques were good and valid orders for the payment of their amount. It was proved that he ordered goods of the prosecutors, and said he wished to pay ready money for them. He gave cheques on a bank for the price, and took away the goods. He had shortly before opened an account at the bank, but had drawn out the amount paid in except 5s. 3d. Various cheques of his had been refused payment, and he would not have been permitted to overdraw. The jury found that he did not intend when he gave the cheques mentioned in the indictment to meet them, and that he intended to defraud. A verdict of guilty was thereupon recorded, and it was held that there was evidence of the false pretence that the cheques were good and valid orders for the payment of their amount.

“If,” said Kelly, C. B., “a man’s account were overdrawn, and he had reason to suppose that his cheque would still be honoured, this might be consistent with his having authority to draw and with his cheque being a good and valid order. But in the present case it is quite clear that the prisoner knew that his account at the bank was virtually closed, and that he knew his cheque would not be paid. He had, therefore, no authority to draw, and his cheque was not a good and valid order, that is to say, one which might be cashed.”

Post-dated Cheque.—In *Rex v. Parker* (a) the prisoner was charged with falsely pretending that a post-dated cheque, drawn by himself, “was a good and genuine order for 25*l.*, and of the value of 25*l.*,” by means of which he obtained a watch and chain. It was found by the jury that, before the completion of the sale and the delivery of the watch by the prosecutor to the prisoner, the prisoner represented to the prosecutor that he had an account with the bankers on whom the cheque was drawn, and that he had a right to draw the cheque, though he postponed the date for his own convenience, all which was false; and that he represented that the cheque would be paid on or after the day of the date, but that the prisoner had no reasonable ground to believe that it would be paid,

(z) (1874), 2 C. C. R. 134.

(a) (1837), 7 C. & P. 825.

or that he could provide funds to pay it. The prisoner was convicted, and the judges held the conviction right.

Obtaining goods by a false statement that a bill (given for the price) drawn on and accepted by the prisoner, and purporting to be payable a month later at a particular bank, would be paid at the bank the next day, and that he had made arrangements for it, was held obtaining by false pretences within the Act (*b*).

Obtaining Credit.—Obtaining credit in account from his banker by drawing a bill on a person on whom the party had no right to draw, and which there was no chance would be paid, was held not within 7 & 8 Geo. 4, c. 29, s. 53, though the banker had paid money for him in consequence thereof to an extent he would not otherwise have done (*c*). But apparently such a case would now come within 32 & 33 Vict. c. 62, s. 13, sub-s. 1.

Personation of Payee.—It is, of course, obtaining by false pretences to procure the payment of a draft by assuming the name of another to whom money is required to be paid by a genuine instrument (*d*).

Continuance of False Pretence.—In *Reg. v. Greathead* (*e*) the defendant obtained from the prosecutor by a false pretence a cheque which was not paid owing to an omission in the body of it. The defendant thereupon returned it to the prosecutor, who immediately tore it up, drew another for the same amount, and gave it to the defendant, who got it cashed and appropriated the money to his own use. It was held that the original false pretence continued, and induced the giving of the second cheque, and that, therefore, the money which the defendant obtained by getting it cashed was obtained by false pretences.

Distinction between False Pretences and Larceny.—This distinction was explained by Blackburn, J., in *Reg. v. Prince* (*f*), as follows: "If the owner intended the property to pass, though he would not so have intended had he known the real facts, that is

(*b*) *Reg. v. Hughes* (1858), 1 F. & F. 355.

(*c*) *Rex v. Wavell* (1829), 1 Mood. C. C. 224.

(*d*) *Rex v. Story* (1805), R. & R. 81.

(*e*) (1878), 14 Cox, 108; 38 L. T. 691.

(*f*) (1868), 1 C. C. R. 150.

sufficient to prevent the offence of obtaining another's property from amounting to larceny; and where the servant has an authority co-equal with his master's, and parts with his master's property, such property cannot be said to be stolen, inasmuch as the servant intends to part with the property in it. If, however, the servant's authority is limited, then he can only part with the possession, and not with the property; if he is tricked out of the possession, the offence so committed will be larceny. In *Rex v. Longstreeth* (*g*) the carrier's servant had no authority to part with the goods, except to the right consignee. His authority was not generally to act in his master's business, but limited in that way. The offence was in that case held to be larceny on that ground, and this distinguishes it from the pawnbroker's case (*h*), which the same judges, or at any rate some of them, had shortly before decided. There the servant, from whom the goods were obtained, had a general authority to act for his master, and the person who obtained the goods was held not to be guilty of larceny. So, in the present case, the cashier holds the money of the bank with a general authority from the bank to deal with it. He has authority to part with it on receiving what he believes to be a genuine order. Of the genuineness he is the judge; and if under a mistake he parts with money, he none the less intends to part with the property in it, and thus the offence is not, according to the cases, larceny, but an obtaining by false pretences. The distinction is inscrutable to my mind, but it exists in the cases."

Accordingly, a person who induces a cashier of a bank to pay him money by presenting a forged order, knowing it to be such, does not commit larceny of the money received, but obtains it by false pretences (*i*).

So a clerk to a savings bank, obtaining a cheque from the manager on a false representation that a depositor has given notice of withdrawal, and for the pretended purpose of handing the cheque to the depositor, commits the crime of obtaining by false pretences and not larceny (*k*).

(*g*) (1826), 1 Moo. C. C. 137.

(*h*) *Rex v. Jackson* (1826), 1 Moo. C. C. 119.

(*i*) *Reg. v. Prince*, cited on the pre-

H.

ceding page.

(*k*) *Reg. v. Essex* (1857), D. & B. 371; 27 L. J. M. C. 20; 7 Cox, 384; 4 Jur. N. S. 15.

In *Brittain v. Bank of London* (l) a customer of a bank having a paid cheque of his sent back to him by the bankers, altered the style of handwriting, so as to make it appear not his, and then returned it, declaring it to have been a forgery, and got credit from them for the amount on account; at the same time making a statement to the effect that the plaintiff had forged the cheque, supporting that statement by specific facts which, if true, would have constituted reasonable ground for suspecting that the plaintiff had been guilty of forgery. The bank having thereupon given the plaintiff into custody on a charge of forgery, it was held that there had been no forgery by the customer; that, even if there had been, there was not reasonable ground for suspecting the plaintiff to have been guilty of felony; and that as the real offence committed was only misdemeanour (in obtaining money by false pretences) there was no justification for giving the plaintiff into custody.

Larceny.

The theft of cheques is governed by the provisions of the Larceny Act, 1861 (24 & 25 Vict. c. 96), dealing with valuable securities.

27. Whosoever shall steal, or shall for any fraudulent purpose destroy, cancel, or obliterate the whole or any part of any valuable security, other than a document of title to lands, shall be guilty of felony, of the same nature and in the same degree, and punishable in the same manner, as if he had stolen any chattel of like value with the share, interest or deposit to which the security so stolen may relate, or with the money due on the security so stolen, or secured thereby and remaining unsatisfied, or with the value of the goods or other valuable thing represented, mentioned or referred to in or by the security.

1. The term "document of title to goods" shall include any bill of lading, India warrant, dock warrant, warehouse keeper's certificate, warrant or order for the delivery or transfer of any goods or valuable thing, bought and sold note, or any other document used in the ordinary course of business as proof of the possession or control of goods, or authorizing or purporting to authorize, either by indorsement or by delivery, the possessor of such document to transfer or receive any goods

(l) (1863), 3 F. & F. 465; 11 W. R. 569; 8 L. T. 382.

thereby represented or therein mentioned or referred to. The term "document of title to lands" shall include any deed, map, paper or parchment, written or printed, or partly written and partly printed, being or containing evidence of the title or any part of the title to any real estate, or to any interest in or out of any real estate. . . .

The term "valuable security" shall include any order, Exchequer acquittance, or other security whatsoever entitling or evidencing the title of any person or body corporate to any share or interest in any public stock or fund, whether of the United Kingdom, or of Great Britain, or of Ireland, or of any foreign state, or in any fund of any body corporate, company, or society, whether within the United Kingdom or in any foreign state or country, or to any deposit in any bank, and shall also include any debenture, deed, bond, bill, note, warrant, order or other security whatsoever for money or for payment of money, whether of the United Kingdom, or of Great Britain, or of Ireland, or of any foreign state, and any document of title to lands or goods as hereinbefore defined.

Position of Banker.

The Larceny Act, 1861 (24 & 25 Vict. c. 96), provides—

100. If any person guilty of any such felony or misdemeanour as is mentioned in this Act, in stealing, taking, obtaining, extorting, embezzling, converting or disposing of, or in knowingly receiving any chattel, money, valuable security, or other property whatsoever, shall be indicted (*m*) for such offence, by or on the behalf of the owner of the property, or his executor or administrator, and convicted thereof, in such case the property shall be restored to the owner or his representative; and in every case in this section aforesaid the Court before whom any person shall be tried for any such felony or misdemeanour shall have power to award from time to time writs of restitution for the said property or to order the restitution thereof in a summary manner: Provided, that if it shall appear before any award or order made that any valuable security shall have been *bonâ fide* paid or discharged by some person or body corporate, liable to the payment thereof, or being a negotiable instrument shall have been *bonâ fide* taken or received by transfer or delivery, by some person or body

(*m*) See *Chichester v. Hill* (1882), 52 L. J. Q. B. 160; *Moss v. Hancock*, [1899] 2 Q. B. 111, at p. 118.

corporate, for a just and valuable consideration, without any notice or without any reasonable cause to suspect that the same had by any felony or misdemeanour been stolen, taken, obtained, extorted, embezzled, converted, or disposed of, in such case the Court shall not award or order the restitution of such security: Provided also, that nothing in this section contained shall apply to the case of any prosecution of any trustee, banker, merchant, attorney, factor, broker, or other agent intrusted with the possession of goods or documents of title to goods for any misdemeanour against this Act (*n*).

(*n*) See Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 27 (3).

Part IV.

ACCEPTANCES.

CHAPTER I.

THE BANKER'S POSITION.

Duty Dependent upon Agreement.

WE have seen that, so far as a banker is the debtor of his customer on the current account, he is bound by virtue of the contract between them to honour the customer's cheques presented in due form. It is otherwise with regard to bills of exchange accepted, and promissory notes made, by the customer payable at the banker's house, and bills of exchange drawn by the customer upon the banker.

Bills Payable at Bank.

A banker is apparently under no obligation to pay a bill accepted, or a note made, by his customer payable at his bank, even though the balance in favour of his customer is sufficient to meet it, unless the banker has expressly or impliedly agreed to do so.

"The relation of banker and customer," said Lord Macnaghten, in the course of his speech in *Bank of England v. Vagliano Brothers* (a), "does not of itself, and apart from other circumstances, impose upon a banker the duty of paying his customer's

(a) [1891] A. C. 107, at p. 157.

acceptances. If authority is wanted for this proposition it will be found in *Robarts v. Tucker* (*b*), where it was said by the Court that 'if bankers wish to avoid the responsibility of deciding on the genuineness of indorsements, they may require their customers to domicile their bills at their own offices, and to honour them by giving a cheque upon the banker.' That implies that bankers may refuse to pay their customer's acceptances, and that such refusal is not inconsistent with the relation of banker and customer, or a breach of the banker's duty to his customer. If a banker undertakes the duty of paying his customer's acceptances, the arrangement is the result of some special agreement, expressed or implied" (*c*).

It is conceived that, in view of the general practice in the matter, very slight evidence would be accepted by both judges and juries as establishing an agreement on the part of the banker to pay his customer's bills.

Thus, if a customer pays to his banker a sum, stating that it is for the purpose of meeting a bill, and the banker receives it without giving any intimation that it will not be so applied, this will be sufficient evidence of an agreement on the part of the banker to apply the money as directed (*d*).

So if the banker has habitually paid his customer's bills, he will be taken to have agreed to continue to do so as long as he has sufficient assets and has given no notice to his customer of a contrary intention (*e*).

The obligation of the banker, where it exists, will only be to pay a bill presented during banking hours, and provided at the time of presentation the balance upon his customer's account is adequate (*f*).

Where a bill was presented during banking hours and dishonoured for want of assets, and presented again after business

(*b*) (1851), 16 Q. B. 560.

(*c*) A "domiciled bill" usually means a bill made payable elsewhere than at the residence or place of business of the drawee: Chalmers' Bills of Exchange, 6th ed. p. 15.

(*d*) *Bell v. Carey* (1849), 8 C. B. 887; *Hill v. Smith* (1844), 12 M. & W. 619; and per V.-C. Malins in *Hill v. Royds*

(1869), 8 Eq. 290, at p. 292.

(*e*) See *Armfield v. London and Westminster Bank* (1883), 1 Cab. & E. 170, cited at p. 146, in which this seems to have been assumed without argument.

(*f*) *Whitaker v. Bank of England* (1835), 1 C. M. & R. 744. See also *Parker v. Gordon* (1806), 7 East, 385; *Elford v. Tred* (1813), 1 M. & S. 28.

hours, the banker having meanwhile received assets sufficient to meet it, Lord Abinger, C.B., expressed the view that it would, under such circumstances, be proper for a clerk who happened to be in the office and aware of the facts, to inform the person presenting the bill a second time that since the previous presentment the banker had received assets and that the bill would be paid on the following day (*g*).

The Banker's Authority to Pay.—The fact of making an acceptance payable at the acceptor's bank amounts to an authority to the banker to pay it, even though there is not a sufficient balance to the credit of the customer.

This was decided in *Kymer v. Laurie* (*h*), where Patteson, J., delivering the judgment of the Court on an application for a new trial, said: "This was an action against the defendants, who are bankers, for not honouring the plaintiff's cheque for 7*l.* 11*s.*, the plaintiff alleging that they had funds in their hands. It appeared that on the 20th of March the balance in the plaintiff's favour was 21*l.* 4*s.* On that day an acceptance of the plaintiff, made payable by him at the defendants' for 42*l.*, was presented and paid. The cheque in question was presented about a week afterwards. The plaintiff was prepared to prove that on the 20th, after the acceptance had been paid, a clerk of the defendants called on him to know what should be done about that acceptance, not stating that it had been paid; that the plaintiff directed that it should not be paid; that the clerk endeavoured to get the money back from the persons to whom it had been paid, marking the acceptance as paid and cancelled by mistake, but they refused to refund; and that the defendants had afterwards, on the 25th of March, honoured a cheque drawn by the plaintiff for 13*l.* 13*s.*; and so the plaintiff contended that the defendants had paid the acceptance for 42*l.* in their own wrong, as appeared by their own conduct, and had still funds in hand sufficient to pay the cheque in question for 7*l.* 11*s.* The learned judge held, that these facts, if proved, would make no difference; that the defendants had authority from the plaintiff to apply his money towards the payment of the

(*g*) *Whitaker v. Bank of England*, see last note.

(*h*) (1849), 18 L. J. Q. B. 218.

acceptance, and so had properly applied and exhausted his funds, and that what happened afterwards was immaterial. We think he was right in so holding. The plaintiff, by making the acceptance payable at the defendants', clearly authorized them to pay it; and if the balance in his favour had been 42*l.* on the 20th of March, they would have been bound to pay it, unless the plaintiff before it was presented had countermanded that authority. They were not, indeed, bound to pay it under the existing circumstances, because they had not sufficient funds; but they were fully authorized to apply what funds of the plaintiff they had towards the payment" (i).

Revocation of Authority.—As a general rule the customer can revoke an authority given by him to his banker to pay an acceptance (k).

But where, in pursuance of the instructions of the customer, the banker has communicated to the holder of a bill the fact that he has been provided with assets to meet it, and rendered himself directly liable to the holder, the customer cannot revoke his authority to pay the holder (l).

A receiving order in bankruptcy made against the customer, or notice of an available act of bankruptcy committed by him, will amount to a revocation of the authority of the banker to pay a bill on his behalf (m).

Bills Drawn upon the Banker.

A banker is under no obligation to accept a bill of exchange drawn on him by his customer, or his customer's creditor, unless he has specially agreed to do so; nor is he, it seems, bound to pay such a bill (n). *A fortiori*, the Bank of England is of course under

(i) See also *Robarts v. Tucker* (1851), 16 Q. B. 560.

(k) *Gibson v. Minot* (1824), 2 Bing. 7; Ry. & M. 68; 1 C. & P. 247. See also *Williams v. Everett* (1811), 14 East, 582; *Hodgson v. Anderson* (1825), 3 B. & C. 842; 5 D. & R. 735; and Chap. 8 of this Part.

(l) *Per curiam* in *Hodgson v. Anderson*,

cited in last note; per Lord Ellenborough in *Williams v. Everett*, cited in last note.

(m) See p. 230, *supra*, and *Citizens' Bank of Louisiana v. First National Bank of New Orleans* (1873), 6 E. & I. A. 352.

(n) *Smith v. Brown* (1815), 6 Taunt. 340, at p. 344; *Goodwin v. Robarts* (1875), L. R. 10 Ex. 337, at p. 351 (affirmed, 1 A. C. 476); and per Lord Macnaghten,

no obligation to accept a bill drawn upon it by a person who owns Government securities on which dividends are due and in the hands of the Bank (*o*).

The obligation of the banker under a letter of credit is dealt with in Part VI. Chap. 4.

The relative position of the banker and his customer where the former has accepted a bill drawn by the latter is explained by Tindal, C. J., in *Bank of England v. Anderson* (*p*), as follows: "By taking the acceptance, the customer consents that his money shall remain in his banker's hands until the bill becomes due; he has no power or right, after receiving the acceptance, to change his mind, cancel the acceptance, and compel the banker to pay his money on demand. The drawing and accepting the bill forms a contract between the drawer and acceptor, which can only be rescinded by the mutual consent of both: for, what would be the condition of the banker who may have lent the money of his customer on the faith of the forbearance given, if the law were otherwise? The relative position, therefore, of the customer and the banker seems indistinguishable as to its legal consequences in any material respect from that of lender and borrower. . . . Whenever the drawee of a bill of exchange accepts it, he becomes a debtor to the holder of the bill to the amount of the sum specified in the bill, and the holder gives credit to the acceptor to that amount until the maturity of the bill."

Restriction upon the Acceptance of Bills by Bankers.—With the exception of the Bank of England and certain bankers and banking companies who had the right of issuing bank-notes on the 6th May, 1844, no banker or banking company may draw, accept, make or issue in England or Wales any bill of exchange or promissory note or engagement for the payment of money payable to bearer on demand, or borrow, owe or take up in England or Wales any sums or sum of money on the bills or notes of a banker payable to bearer on demand (*q*).

at p. 341, *supra*. See, however, Lord Campbell's speech in *Foley v. Hill* (1848), 2 H. L. C. 28, at p. 45.

(*o*) *In re Boyse, Crofton v. Crofton* (1886), 33 Ch. D. 612.

(*p*) (1837), 4 Scott, 50; 3 Bing. N. C. 589; 1 Jur. 9; 2 Keen, 328; 2 Hodges, 294.

(*q*) 7 & 8 Vict. c. 32, s. 11; 17 & 18 Vict. c. 83, s. 11. Cf. *Booth v. Bank of*

Documentary Bills.—In *Woods v. Thiedemann* (r) the defendant, a merchant at Newcastle, was a customer of the plaintiffs, bankers at Newcastle, whose London agent was the Union Bank. H., a merchant at Wolgast, in Prussia, wrote to the defendant stating that he was inclined to consign to him a cargo of wheat, and asking for how much and at what date the defendant would open for him a credit in London. The defendant wrote in reply: "You may draw against transmittal of bill of lading at 30s. to 32s. per quarter in advance for your best yellow wheat on our account at fourteen days, one, two, or three months' date, on the Union Bank of London." H. afterwards wrote to the defendant, stating that he was about to consign to him 8,320 scheffels of wheat shipped by the vessel *Anna*, Captain K., and that he annexed duplicate bill of lading. On the same day H. wrote to the Union Bank stating that he had drawn on them six bills of exchange for 400l. each, for account of defendant. The Union Bank, having no instructions, sent the letter to plaintiffs. Messrs. B. and C. afterwards presented to the Union Bank for acceptance six bills of exchange for 400l. each, drawn and indorsed by H., together with a paper writing purporting to be a bill of lading indorsed by H. in blank. The plaintiffs having sent to the defendant the letter which H. addressed to the Union Bank, the defendant came to the plaintiffs' bank and had some conversation with the manager respecting the cargo of wheat supposed to have been shipped by H., when defendant said "it was a large amount, and that they must only accept against the bill of lading." The defendant then wrote to the plaintiffs as follows: "We shall feel obliged by your requesting the Union Bank of London to accept the drafts of Mr. H., of Wolgast, for 2,400l. against properly indorsed bill of lading of 8,320 scheffels of wheat per *Anna*, F. K. master, on our account." The Union Bank, at the request of the plaintiffs, accepted the drafts, and the plaintiffs debited the defendant with the amount. Before the drafts became due it was discovered that the bill of lading was forged, and that no cargo

England (1840), 6 Bing. N. C. 415.—The restriction is limited to persons and companies engaged in banking: *Higan v. Fowler* (1816), 1 Stark. 459; *Perring*

v. Dunstan (1826), Ry. & M. 426. See further on this subject Part VI. Chap. 1.

(r) (1862), 1 H. & C. 478.

was shipped on board the *Anna*. H. was afterwards convicted of uttering a forged bill of lading. The Union Bank having paid the bills and debited the plaintiffs with the amount, it was held that the plaintiffs were entitled to recover the amount from the defendant.

So, in *Ulster Bank v. Synnott (s)*, the defendant, a merchant, instructed his banker to accept the drafts of L., on being handed clean bill of lading of a cargo consigned to L. A bill of lading purporting to answer to this description was handed by L. to the banker, who accepted his drafts. The bill of lading turned out to be forged. The banker, after learning of this, duly paid the amount of the bill of exchange. It was held that the defendant was liable to his banker for the amount, as the banker's duty was only to see that the document was regular upon its face.

The indorsement of the bill of lading purported to be signed by an agent of the shippers. It was held that this circumstance did not affect the banker. Moreover, there being in mercantile transactions two forms of indorsement by an agent—one simply “p.,” “pro,” “for,” which expresses an authority generally; the other “per pro,” or “p. p.,” which expresses an authority created by procuration or power of attorney—and the bill of lading being indorsed in the first of these forms, it was held that this circumstance did not make the indorsement so irregular on its face as to render the banker liable for neglect of duty.

(s) (1871), 5 Ir. R. Eq. 595.

CHAPTER II.

FORM AND NATURE OF ACCEPTANCES.

WITH regard to bills of exchange and promissory notes generally, it will be sufficient for the present purpose to refer to the Bills of Exchange Act, 1882, which is set out at length in the Appendix to this treatise.

The rules as to acceptance must be considered here.

Requisites of Acceptance.—The statute mentioned provides—

17.—(1.) The acceptance of a bill is the signification by the drawee of his assent to the order of the drawer.

(2.) An acceptance is invalid unless it complies with the following conditions, namely:

(a) It must be written on the bill, and be signed by the drawee. The mere signature of the drawee without additional words is sufficient.

(b) It must not express that the drawee will perform his promise by any other means than the payment of money (a).

The acceptance will be valid if the signature of the drawee is written by some other person by or under his authority (b).

An instrument in the following form—"On demand, I promise to pay to A. B. or bearer the sum of 15*l.* for value received"—and addressed in the margin to "J. Bell," who had written across it, "Accepted, J. Bell," was held to amount to a promissory note (c).

Time for Acceptance. 18. A bill may be accepted—

(1.) Before it has been signed by the drawer, or while otherwise incomplete:

(a) See *Steele v. M'Kinlay* (1880), 5 A. C. 754; *Wilkinson v. Unwin* (1881), 7 Q. B. D. 636.

(b) Sect. 91 (1).

(c) *Block v. Bell* (1831), 1 M. & R. 149. Cf. *Fielder v. Marshall* (1861), 30 L. J. C. P. 158; 9 C. B. N. S. 606; 7 Jur. N. S. 777; 3 L. T. 858.

- (2.) When it is overdue, or after it has been dishonoured by a previous refusal to accept, or by non-payment :
- (3.) When a bill payable after sight is dishonoured by non-acceptance, and the drawee subsequently accepts it, the holder, in the absence of any different agreement, is entitled to have the bill accepted as of the date of first presentment to the drawee for acceptance.

General and Qualified Acceptances. 19.—(1.) An acceptance is either (a) general or (b) qualified.

(2.) A general acceptance assents without qualification to the order of the drawer. A qualified acceptance in express terms varies the effect of the bill as drawn.

In particular an acceptance is qualified which is—

- (a) conditional, that is to say, which makes payment by the acceptor dependent on the fulfilment of a condition therein stated :
- (b) partial, that is to say, an acceptance to pay part only of the amount for which the bill is drawn :
- (c) local, that is to say, an acceptance to pay only at a particular specified place :
An acceptance to pay at a particular place is a general acceptance, unless it expressly states that the bill is to be paid there only, and not elsewhere :
- (d) qualified as to time :
- (e) the acceptance of some one or more of the drawees, but not of all.

Conditional Acceptance.—A common condition in an acceptance is to the effect that the bill shall be payable on bills of lading being given up (*d*).

Partial Acceptance.—In *Wegervstoffe v. Keene* (*e*) a bill drawn for 127*l.* 18*s.* 4*d.* was accepted for 100*l.* This acceptance was held good *pro tanto*.

Local Acceptance.—An acceptance payable at a particular bank only is a qualified acceptance (*f*).

Qualification must be Clear.—If the acceptor of a bill of exchange desires to qualify his acceptance, he must do so on the face of the

(*d*) See *Smith v. Vertue* (1860), 30 L. J. C. P. 56 ; 9 C. B. N. S. 214 ; 7 Jur. N. S. 395 ; 3 L. T. 583 ; 9 W. R. 146.

(*e*) (1709), 1 Strange, 214. Cf. *Petit v. Benson* (1697), Comberb. 452.

(*f*) See the express words of sect. 19 (*c*).

bill in clear and unequivocal terms, and so that any person taking the bill could not if he acted reasonably fail to understand that it was accepted subject to an expressed qualification.

In *Meyer & Co. v. Decroix, Verley et Cie.* (g) a bill of exchange was drawn by L. Delobbel Flipo payable "to order Mr. L. Delobbel Flipo." The drawees stamped in printed letters across the face of the bill the words, "Accepted payable at Alliance Bank, London, for" the drawees. Above these words the drawees wrote, "In favour of Mr. L. Delobbel Flipo only. No. 28." The word "order" was struck out, but when or by whom did not appear. In an action on the bill by indorsees for value against the acceptors, it was held that, looking at the position and collocation of the words as they appeared on a facsimile of the bill, the words "In favour of Mr. L. Delobbel Flipo only" did not constitute a qualification of the acceptance, that the acceptance was a general acceptance of a negotiable bill, and that the action was maintainable.

Position of Parties as to Qualified Acceptances. 44.—(1.) The holder of a bill may refuse to take a qualified acceptance, and if he does not obtain an unqualified acceptance may treat the bill as dishonoured by non-acceptance.

(2.) Where a qualified acceptance is taken, and the drawer or an indorser has not expressly or impliedly authorized the holder to take a qualified acceptance, or does not subsequently assent thereto, such drawer or indorser is discharged from his liability on the bill.

The provisions of this sub-section do not apply to a partial acceptance, whereof due notice has been given. Where a foreign bill has been accepted as to part, it must be protested as to the balance.

(3.) When the drawer or indorser of a bill receives notice of a qualified acceptance, and does not within a reasonable time express his dissent to the holder, he shall be deemed to have assented thereto.

Blank Acceptance. 20.—(1.) Where a simple signature on a blank stamped paper is delivered by the signer in order that it may be converted into a bill, it operates as a *primâ facie* authority to fill it up as a complete bill for any amount the

stamp will cover, using the signature for that of the drawer, or the acceptor, or an indorser; and, in like manner, when a bill is wanting in any material particular, the person in possession of it has a *prima facie* authority to fill up the omission in any way he thinks fit.

(2.) In order that any such instrument when completed may be enforceable against any person who became a party thereto prior to its completion, it must be filled up within a reasonable time, and strictly in accordance with the authority given. Reasonable time for this purpose is a question of fact.

Provided that if any such instrument after completion is negotiated (*h*) to a holder in due course (*i*) it shall be valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up within a reasonable time and strictly in accordance with the authority given.

When a bill is accepted in blank for the purpose of being negotiated, and is afterwards filled in with the names and signature of a person as drawer and indorser, the acceptor cannot, as against a *bonâ fide* indorsee for value, adduce evidence to show that either the drawing or indorsement is a forgery (*k*). He would apparently be in the same position with regard to his own banker.

In *Garrard v. Lewis* (*l*) the defendant signed an acceptance, the amount in the body of which was then left in blank, but in the margin of which were the figures 14*l.* 0*s.* 6*d.*, that being the sum for which the defendant desired to accept. He then handed the acceptance to the drawer, who subsequently filled in the blank in the body of the bill for 164*l.* 0*s.* 6*d.*, and fraudulently altered the figures in the margin to that sum. The bill was then indorsed by the drawer to the plaintiffs, who took it *bonâ fide* for value for the larger amount. It was held that the defendant was liable on the bill for such larger amount, on the grounds that the marginal figures are not an essential part of a bill of exchange; that one who gives an acceptance in blank holds out the person he entrusts therewith as having authority to fill in the bill as he pleases within the limits of the stamp; and that no alteration (even if it be fraudulent and unauthorized) of the marginal figures can vitiate

(*h*) See *Baxendale v. Bennett* (1878), 3 Q. B. D. 525, cited at p. 260, *supra*.

(*i*) See *Herdman v. Wheeler*, [1902] 1 K. B. 361; 18 T. L. R. 190; *Lewis v.*

Clay (1897), 14 T. L. R. 149.

(*k*) *London and South Western Bank v. Wentworth* (1880), 5 Ex. D. 96.

(*l*) (1882), 10 Q. B. D. 30.

the bill as a bill for the full amount inserted in the body when it reaches the hands of a holder for value who is unaware that the marginal figures have been improperly altered.

As to the delivery necessary to complete an acceptance reference should be made to pages 258—263.

Liability upon Bill. 23. No person is liable as drawer, indorser, or acceptor of a bill who has not signed it as such: provided that—

- (1.) Where a person signs a bill in a trade or assumed name he is liable thereon as if he had signed it in his own name;
- (2.) The signature of the name of a firm is equivalent to the signature by the person so signing of the names of all persons liable as partners in that firm.

In order that a firm may be bound by a negotiable instrument the firm-name must have been used. The signature of a partner in his own name is insufficient (*m*).

A partner has no implied authority to bind his co-partners by his acceptance of a bill of exchange, except by an acceptance in the true style of the partnership. Therefore, where a firm consisted of J. B. and C. H., the partnership name being “J. B.” only, and C. H. accepted a bill in the name of “J. B. & Co.,” it was held that J. B. was not bound thereby (*n*).

Where a signature is common to an individual and a firm of which the individual is a member, a *bonâ fide* holder for value of a bill of exchange with such signature attached, without notice whose paper it is, has not an option to sue either the individual or the firm. But there is a presumption that the bill was given for the firm and is binding upon it—at least, where the individual carries on no business separate from the business of the firm of which he is a member; this presumption, however, may be rebutted by proof that the bill was signed, not in the name of the partnership, but of the individual for his private purposes, and it is immaterial

(*m*) *Nicholson v. Ricketts* (1860), 29 L. J. Q. B. 55; 2 Ell. & Ell. 497; 6 Jur. N. S. 422; 8 W. R. 211. See also *Sheppard v. Dry* (1840), Byles on Bills, 16th ed. p. 53.

(*n*) *Kirk v. Blurton* (1841), 9 M. & W. 284. See *Norton v. Seymour* (1847), 3 C. B. 792; *Forbes v. Marshall* (1855), 11 Ex. 166; 24 L. J. Ex. 305; *Odell v. Cormack Brothers* (1887), 19 Q. B. D. 223.

that the *bonâ fide* holder took the bill as the bill of the proprietors of the business carried on by the partnership, whoever they might be, and not merely as the bill of the individual.

In *Yorkshire Banking Co. v. Beatson* (o) B. and M. carried on business in partnership. M. was a dormant partner, and B. was the only ostensible partner, the business being carried on in his name alone. B. entered into accommodation transactions for his private purposes, and, without the authority of M., accepted and indorsed bills of exchange in his own name only. B., in becoming party to these bills, did not intend to bind M., but he considered the bills as private transactions, and signed them merely on his own behalf. The plaintiffs became *bonâ fide* holders for value of the bills signed by B., and took the bills as the bills of the proprietors of the business carried on by the partnership, and not merely as the bills of B. Besides the business of the partnership B. was not engaged in any business. It was held that the plaintiffs could not hold M. liable upon the bills accepted and indorsed by B.

A bill of exchange or promissory note accepted, made, or indorsed by or on behalf or on account of a company registered under the Companies Acts by any person acting under the authority of the company, is deemed to have been accepted, made, or indorsed on behalf of the company (p).

Signature by Procuration. 25. A signature by procuration operates as notice that the agent has but a limited authority to sign, and the principal is only bound by such signature if the agent in so signing was acting within the actual limits of his authority.

When an agent accepts or indorses "per pro." and has authority to do so, his abuse of it does not affect a *bonâ fide* holder for value (q).

But an authority to indorse bills "per pro." for the purpose of

(o) (1880), 5 C. P. D. 109.

(p) Companies Act, 1862 (25 & 26 Vict. c. 89), s. 47. See also sect. 42 of the Act, cited at p. 96, *supra*; and cf. sect. 97 (3) of the Bills of Exchange Act.

(q) *Bryant, Powis and Bryant v. Banque*

du Peuple, [1893] A. C. 170; *Hambro & Son v. Burnand* (1904), 20 T. L. R. 398; *Alexander v. Mackenzie* (1848), 6 C. B. 766; *Stagg v. Elliott* (1862), 12 C. B. N. S. 373. Cf. *In re Land Credit Co. of Ireland* (1869), 4 Ch. 460; *National Bank of Scotland v. Dewhurst* (1896), 1 Com. Cas. 318.

paying them into the principal's banking account does not amount to an authority to negotiate, or obtain payment of the bills (*r*).

In *Reid v. Rigby & Co.* (*s*) the defendants' manager, who had authority to draw on the defendants' banking account for the purposes of their business, but had no authority to overdraw the account or to borrow money on behalf of the defendants, borrowed 20*l.* from the plaintiffs, stating that he wanted the money to pay the wages of the defendants' workmen, and gave as security a cheque signed in his own name by procuration for the defendants. The manager had overdrawn the defendants' banking account, and he borrowed the money for his own purposes, to replace money of the defendants which he had abstracted, but he paid the money in to the defendants' account at their bank, and used it to pay the wages of the defendants' workmen. In an action on the cheque, and to recover the amount as money received to the use of the plaintiff, it was held, first, that as, by virtue of sect. 25 of the Bills of Exchange Act, the plaintiff must be taken to have had notice that the agent had but a limited authority to sign, and the defendants could only be bound if the agent acted within the limits of his authority, the claim on the cheque must fail: secondly, that as the money had found its way into the defendants' possession and had been employed for their benefit, it was money received by them to the use of the plaintiff, and, although the defendants had not been aware that their manager had borrowed the money, the plaintiff was entitled to recover (*t*).

Signature as Agent or in Representative Capacity. 26.—

(1.) Where a person signs a bill as drawer, indorser or acceptor, and adds words to his signature, indicating that he signs for or on behalf of a principal, or in a representative character, he is not personally liable thereon; but the mere addition to his signature of words describing him as an agent, or as filling a representative character, does not exempt him from personal liability.

(2.) In determining whether a signature on a bill is that of the principal or that of the agent by whose hand it is written,

(*r*) *Gompertz v. Cook* (1903), 20 T. L. R. 106, in which *Bryant, Powis and Bryant v. Banque du Peuple* (cited in last note) was distinguished.

(*s*) [1894] 2 Q. B. 40.

(*t*) See also *Jacobs v. Morris*, [1902] 1 Ch. 816.

the construction most favourable to the validity of the instrument shall be adopted.

In *Courtauld v. Saunders* (*u*) a promissory note, signed by defendants, who described themselves on the note as directors of the Financial Insurance Co. (Ltd.), and countersigned by the manager, was in these words:—

“Three months after date we promise to pay the English Joint Stock Bank (Ltd.) or order the sum of 1,000*l*. Value received.

“HUGH WARD SAUNDERS,	} Directors of the Financial Insurance Company, Limited.
“W. WATSON,	
“R. T. BLUNT.	
“W. W. PROLE,	

“At the National Provincial Bank of Glasgow, London.

“Charles C. Green, Manager.”

It was held that the note pledged the personal liability of the makers, Mr. Justice Willes saying: “The rule is clear that a person signing a note, in order not to be liable on the ground of his being an agent, must say so on the face of the note.”

In *Dutton v. Marsh* (*x*) a promissory note commencing, “We the directors of,” &c., “do promise,” was signed by four directors, and the seal of the company was affixed. It was held that the directors were personally liable.

In *Leadbitter v. Farrow* (*y*) an agent of country bankers, to whom the plaintiff had sent money in order to procure a bill upon London, drew in his own name for the amount upon the firm in London. It was held that the agent was personally liable on the bill as drawer, although the plaintiff knew that he was an agent, and that the bill was drawn by him as such and on account of the firm, to which the agent had paid over the money received from the plaintiff. In this case Lord Ellenborough expressed himself thus: “Is it not an universal rule that a man who puts his name to a bill of exchange thereby makes himself personally liable, unless he states upon the face of the bill that he subscribes it for another, or by procuration of another, which are words of exclusion? Unless he says plainly, ‘I am the mere scribe,’ he becomes liable.”

(*u*) (1867), 16 L. T. 562; 15 W. R.
906.

(*x*) (1871), L. R. 6 Q. B. 361.

(*y*) (1816), 5 M. & S. 345.

In *Mare v. Charles* (z) bills of exchange purporting to be "for value received in machinery supplied the adventurers in Hayter and Holme Moor Mines," were directed to the defendant as an individual. He wrote across each of the bills the words, "Accepted for the companies. Payable at the Union Bank, Argyll Place, Regent Street, London. (Signed) William Charles, Purser." He was, in fact, the purser of the mines at the time, but he was not a shareholder, and he accepted the bills by a special order of the committee. It was held that he was personally liable as acceptor.

In *Liverpool Bank v. Walker* (a) executors had carried on their testator's trade in that character, and in the ordinary course of the business accepted a bill of exchange, describing themselves in it simply as executors of their testator. It was held that the estate of one of them, who had died in the lifetime of the other, could be resorted to by indorsees of the bill (b).

But in *Alexander v. Sizer* (c) the defendant was held not personally liable on a promissory note which ran as follows:—

"1,500*l*."

"On demand I promise to pay Messrs. Alexander & Co. or order the sum of one thousand five hundred pounds, with legal interest thereon until paid, value received, the 16th of August, 1865.

"For Mistley, Thorpe and Walton Railway Company.

"(Signed) JOHN SIZER, Secretary" (d).

So, in *Lindus v. Melrose* (e), directors were held not personally liable upon a promissory note which they had signed describing themselves as "directors" of a limited company, and which was countersigned by a person describing himself as secretary, and was drawn in the following form: "London, December 31, 1856. Three months after date we jointly promise to pay S. or order

(z) (1856), 25 L. J. Q. B. 119; 5 El. & Bl. 978; 2 Jur. N. S. 234.

(a) (1859), 4 De G. & J. 24.

(b) See also *Forwood Brothers & Co. v. Mathews* (1893), 10 T. L. R. 138.

(c) (1869), L. R. 4 Ex. 102.

(d) Cf. *Gray v. Raper* (1866), 1 C. P. 694.

(e) (1858), 3 H. & N. 177; 27 L. J. Ex. 326; 4 Jur. N. S. 488.

six hundred pounds, for value received in stock on account of the L. & B. Co., Limited.”

Bill in a Set. 71.—(1.) Where a bill is drawn in a set, each part of the set being numbered and containing a reference to the other parts, the whole of the parts constitute one bill.

(2.) Where the holder of a set indorses two or more parts to different persons, he is liable on every such part, and every indorser subsequent to him is liable on the part he has himself indorsed as if the said parts were separate bills.

(3.) Where two or more parts of a set are negotiated to different holders in due course, the holder whose title first accrues is as between such holders deemed the true owner of the bill; but nothing in this sub-section shall affect the rights of a person who in due course accepts or pays the part first presented to him.

(4.) The acceptance may be written on any part, and it must be written on one part only.

If the drawee accepts more than one part, and such accepted parts get into the hands of different holders in due course, he is liable on every such part as if it were a separate bill.

(5.) When the acceptor of a bill drawn in a set pays it without requiring the part bearing his acceptance to be delivered up to him, and that part at maturity is outstanding in the hands of a holder in due course, he is liable to the holder thereof.

(6.) Subject to the preceding rules, where any one part of a bill drawn in a set is discharged by payment or otherwise, the whole bill is discharged (*f*).

In *Société Générale v. Metropolitan Bank* (*g*) it was held that the person demanding payment of a bill drawn in a set must show that he holds both the genuine parts indorsed by the person of whom he demands it. In view of sub-sect. 6 of the above section it seems doubtful whether this is now the law.

Position of Acceptor. 54. The acceptor of a bill, by accepting it—

(1.) Engages that he will pay it according to the tenor of his acceptance;

(*f*) See *Société Générale pour Favoriser le Développement du Commerce, &c. v. Agopian & Son* (1893), “Times” Newspaper, Dec. 15th, p. 14; 11 T. L. R.

244; *Ralli v. Dennistoun* (1851), 6 Ex. 483; 20 L. J. Ex. 278.

(*g*) (1873), 27 L. T. 849.

- (2.) Is precluded from denying to a holder in due course :
- (a) The existence of the drawer, the genuineness of his signature and his capacity and authority to draw the bill ;
 - (b) In the case of a bill payable to drawer's order, the then capacity of the drawer to indorse, but not the genuineness or validity of his indorsement ;
 - (c) In the case of a bill payable to the order of a third person, the existence of the payee and his then capacity to indorse, but not the genuineness or validity of his indorsement.

CHAPTER III.

INDORSEMENTS.

Negotiation.—The Bills of Exchange Act provides—

31.—(1.) A bill is negotiated when it is transferred from one person to another in such a manner as to constitute the transferee the holder of the bill.

(2.) A bill payable to bearer is negotiated by delivery (*a*).

(3.) A bill payable to order is negotiated by the indorsement of the holder completed by delivery (*a*).

(4.) Where the holder of a bill payable to his order transfers it for value without indorsing it, the transfer gives the transferee such title as the transferor had in the bill, and the transferee in addition acquires the right to have the indorsement of the transferor.

(5.) Where any person is under obligation to indorse a bill in a representative capacity, he may indorse the bill in such terms as to negative personal liability.

Requisites of a Valid Indorsement. 32. An indorsement in order to operate as a negotiation must comply with the following conditions, namely:—

(1.) It must be written on the bill itself and be signed by the indorser. The simple signature of the indorser on the bill, without additional words, is sufficient. An indorsement written on an allonge, or on a “copy” of a bill issued or negotiated in a country where “copies” are recognised, is deemed to be written on the bill itself.

(2.) It must be an indorsement of the entire bill. A partial indorsement, that is to say, an indorsement which purports to transfer to the indorsee a part only of the amount payable, or which purports to transfer the bill to two or more indorsees severally, does not operate as a negotiation of the bill.

(*a*) See sect. 21, cited at p. 258, *supra*.

- (3.) Where a bill is payable to the order of two or more payees or indorsees who are not partners all must indorse, unless the one indorsing has authority to indorse for the others.
 - (4.) Where, in a bill payable to order, the payee or indorsee is wrongly designated, or his name is misspelt, he may indorse the bill as therein described, adding, if he think fit, his proper signature.
 - (5.) Where there are two or more indorsements on a bill, each indorsement is deemed to have been made in the order in which it appears on the bill, until the contrary is proved.
 - (6.) An indorsement may be made in blank or special. It may also contain terms making it restrictive (*b*).
2. "Indorsement" means an indorsement completed by delivery (*c*).

The signature which is necessary to constitute a valid indorsement has been considered at pages 283—285.

In order to constitute a valid indorsement of a bill of exchange as against the indorser, there must be a writing of the name of the holder (which may be in pencil (*d*)), and a manual delivery by him of the bill with the intention, not only to pass the property in it, but to guarantee the payment if the acceptor makes default (*e*).

All that is necessary to give a good title as against the acceptor is the writing of the name of the holder and a manual delivery of the bill, with intent to transfer the property in it to the indorsee, as between him and the acceptor. But as between indorser and indorsee there must be the additional element of an intent to stand in the ordinary relation of indorser, that is, to guarantee the payment if the acceptor makes default (*e*).

Indorsement for Collection.—If a person, after writing his name on a bill, delivers it to another as his agent to collect the money, this does not amount to an indorsement so as to charge the principal at the suit of the agent. The fact that the person to whom

(*b*) See sects. 16 (1), 26 and 35.

(*c*) See sect. 21, at p. 258, *supra*.

(*d*) *Geary v. Physic* (1826), 5 B. & C. 234.

(*e*) *Denton v. Peters* (1870), L. R. 5 Q. B. 475. See sect. 21 of the Act at p. 258, *supra*.

the bill is indorsed is not a mere agent, but has himself an interest in the debt for which the bill is given, does not make any difference (*f*).

Conditional Indorsement. 33. Where a bill purports to be indorsed conditionally the condition may be disregarded by the payer, and payment to the indorsee is valid whether the condition has been fulfilled or not.

Blank and Special Indorsements. 34.—(1.) An indorsement in blank specifies no indorsee, and a bill so indorsed becomes payable to bearer.

(2.) A special indorsement specifies the person to whom, or to whose order, the bill is to be payable (*g*).

(3.) The provisions of this Act relating to a payee apply with the necessary modifications to an indorsee under a special indorsement (*h*).

(4.) When a bill has been indorsed in blank, any holder may convert the blank indorsement into a special indorsement by writing above the indorser's signature a direction to pay the bill to or to the order of himself or some other person.

Restrictive Indorsements. 35.—(1.) An indorsement is restrictive which prohibits the further negotiation of the bill, or which expresses that it is a mere authority to deal with the bill as thereby directed and not a transfer of the ownership thereof, as, for example, if a bill be indorsed "Pay D. only," or "Pay D. for the account of X.," or "Pay D. or order for collection."

(2.) A restrictive indorsement gives the indorsee the right to receive payment of the bill and to sue any party thereto that his indorser could have sued, but gives him no power to transfer his rights as indorsee unless it expressly authorize him to do so.

(3.) Where a restrictive indorsement authorizes further transfer, all subsequent indorsees take the bill with the same rights and subject to the same liabilities as the first indorsee under the restrictive indorsement.

In *Ancher v. Bank of England* (*i*) a bill of exchange drawn by A. on B. payable to C. or order was indorsed by C. in these words: "The within must be credited to D. value in account."

(*f*) *Ibid.* See also sect. 35 of the Act, cited on this page.

(*g*) See sect. 8 (3).

(*h*) See sects. 7, 8.

(*i*) (1781), 2 Doug. 637.

D. was indebted to B., and the bill was sent to B. and accepted by him, and he gave D. notice that he had received it and placed it to D.'s account. It was held that this was such a special indorsement as restrained the negotiability of the bill. Accordingly, a person discounting the bill in reliance upon a forged indorsement purporting to be by D. to pay to E. or order, subsequently written upon it, gained no title to the bill; and an agent of A., upon the insolvency of B., having paid the amount of the bill for A. to the person who had discounted it and taken it up, A. could recover the money so paid (*k*).

Estoppel as to Indorsements binding Acceptor and Drawer.—The acceptor is precluded from denying to a holder in due course—(1) in the case of a bill payable to drawer's order, the then capacity of the drawer to indorse, but not the genuineness or validity of his indorsement; and (2) in the case of a bill payable to the order of a third person, the existence of the payee and his then capacity to indorse, but not the genuineness or validity of his indorsement (*l*).

The drawer is precluded from denying to a holder in due course the existence of the payee and his then capacity to indorse (*m*).

Position of Indorser. 55.—(2.) The indorser of a bill by indorsing it—

- (a) Engages that on due presentment it shall be accepted and paid according to its tenor, and that if it be dishonoured he will compensate the holder or a subsequent indorser who is compelled to pay it, provided that the requisite proceedings on dishonour be duly taken;
- (b) Is precluded from denying to a holder in due course the genuineness and regularity in all respects of the drawer's signature and all previous indorsements;
- (c) Is precluded from denying to his immediate or a subsequent indorsee that the bill was at the time of his indorsement a valid and subsisting bill, and that he had then a good title thereto.

(*k*) See also *Lloyd v. Sigourney* (1829), 5 Bing. 525; *Wedlake v. Hurley* (1830), 1 C. & J. 83; *Buckley v. Jackson* (1868), L. R. 3 Ex. 135.

Robinson v. Yarrow (1817), 7 Taunt. 455; *Garland v. Jacob* (1873), L. R. 8 Ex. 216.

(*l*) Bills of Exchange Act, s. 54. See

(*m*) Bills of Exchange Act, s. 55 (1) (b).

56. Where a person signs a bill otherwise than as drawer or acceptor, he thereby incurs the liabilities of an indorser to a holder in due course.

Indorsement Sans Recours. 16. The drawer of a bill, and any indorser, may insert therein an express stipulation—

(1.) Negating or limiting his own liability to the holder. . . .

So, if a person writes his name on the back of a cheque at the request of the payee, although his indorsement is unnecessary, but adds “*sans recours*,” he negatives his liability under this section (*n*).

(*n*) *Wakefield v. Alexander & Co.* (1901), 17 T. L. R. 217.

CHAPTER IV.

FORGED SIGNATURES.

BEFORE accepting a bill purporting to be drawn by a customer, or paying a bill purporting to be accepted by him, the banker must ordinarily satisfy himself as to the genuineness of the signature of his customer and of any subsequent indorsement.

The Bills of Exchange Act provides—

24. Subject to the provisions of this Act (*a*), where a signature on a bill is forged or placed thereon without the authority of the person whose signature it purports to be, the forged or unauthorized signature is wholly inoperative, and no right to retain the bill or to give a discharge therefor or to enforce payment thereof against any party thereto can be acquired through or under that signature, unless the party against whom it is sought to retain or enforce payment of the bill is precluded from setting up the forgery or want of authority (*b*).

Provided that nothing in this section shall affect the ratification of an unauthorized signature not amounting to a forgery.

If an acceptance is itself forged the banker has obviously no authority to meet it, and his customer will be under no liability to recoup him for a payment made in reliance upon it, unless there be circumstances amounting to a direction from the customer to the banker to pay the bill without reference to the genuineness of the acceptance, or equivalent to an admission of its genuineness, inducing the banker to alter his position, and so precluding the customer from showing it to be forged (*c*).

(*a*) See sects. 54 (2), 55 (2), 60, 80 and 82 of the Act.

(*b*) Payment of one bill which purports to bear the acceptance of the person who pays it is not conclusive

evidence against him that another bill bearing the same sort of acceptance was authorized by him: *Morris v. Bethell* (1869), 5 C. P. 47.

(*c*) Cf. *Robarts v. Tucker* (1851), 16

From the nature of the case the ordinary authority given to the banker—which it would require very exceptional circumstances to vary—is to pay a bill accepted by the customer to the person who is, according to law, capable of giving a good discharge therefor. In the case of a bill payable to order, it is an authority to pay the bill to any person who becomes holder thereof by a genuine indorsement. In the case of a bill payable to bearer, either originally or by reason of a genuine indorsement in blank, it is an authority to pay it to the person who appears to be the holder (*d*).

The acceptance being itself the customer's authority to the banker, if the drawer's signature is forged at the time of the acceptance of a bill payable to bearer, the customer will be bound to recoup the banker if he pays the bill to a bearer. The customer ought to have known the drawer's signature, and it is his act of acceptance which sends the bill forward for payment to the banker (*e*).

But it is otherwise if the payee's indorsement is forged before acceptance. The banker cannot debit his customer with a payment made to one who claims through a forged indorsement, unless there be circumstances amounting to a direction from the customer to the banker to pay the bill without reference to the genuineness of the indorsement, or equivalent to an admission of its genuineness, inducing the banker to alter his position, so as to preclude the customer from the right of showing it to be forged. The mere fact of a customer accepting a bill with a forged indorsement upon it is no evidence of such a direction or of such an inducement (*f*).

A fortiori if the payee's signature is forged by way of indorsement after acceptance, and the banker pays the bill, he cannot charge his customer.

But, in connection with the banker's position where he pays in reliance upon a forged indorsement, it must be remembered that

Q. B. 560; *Wilkinson v. Stoney* (1839),
1 J. & S. 509; *Brook v. Hook* (1871),
L. R. 6 Ex. 89, at p. 100.

(*d*) *Robarts v. Tucker*, see last note;
Forster v. Clements (1809), 2 Camp. 17.

(*e*) Per Lord Macnaghten in *Bank of England v. Vagliano Brothers*, [1891] A. C. 107, at p. 158. See sect. 54 of the Bills of Exchange Act.

(*f*) *Robarts v. Tucker* (1851), 16 Q. B. 560.

where the payee is a fictitious or non-existing person the bill may be treated by the banker as payable to bearer (g).

In *Bank of England v. Vagliano Brothers* (h) certain documents in the form of bills of exchange, purporting to be drawn by one Vucina, were fraudulently manufactured by Glyka, a clerk in the service of Vagliano Brothers. He inserted the name of C. Petridi & Co. as payees in order to make the bills complete in form, but never intending that payment should be made to them. This firm, which carried on business in Constantinople, had been the payee of some genuine bills previously drawn by Vucina upon Vagliano Brothers. Glyka fraudulently induced the latter to accept the bills payable at the Bank of England, and to request the Bank by letter of advice to pay them at maturity. They were presented for payment with indorsements to all appearance regular, these having been written by Glyka, and the Bank paid them over the counter to the persons presenting them at maturity, and who were either Glyka or his agent. Under the circumstances it was held that the Bank was entitled to debit their customers, Vagliano Brothers, with the amounts, on the ground that the named payee was a fictitious or non-existing person within the meaning of the Bills of Exchange Act, 1882, s. 7, sub-s. 3, and that the documents might be treated by the Bank as bills payable to bearer (i).

In the course of his speech in this case Lord Macnaghten dealt with the wider question of the banker's position with regard to payments made by him in reliance upon forged signatures to bills of exchange as follows (k): "In paying their customers' acceptances in the usual way bankers incur a risk perfectly understood, and in practice disregarded. Bankers have no recourse against their customers if they pay on a genuine bill to a person appearing to be the holder, but claiming through or under a forged indorsement. The bill is not discharged; the acceptor remains liable; the banker has simply thrown his money away. That was the effect of the decision in *Robarts v. Tucker* (l). I do not think that that was a harsh decision. Nor do I see how the Court could have come to any other conclusion, unless it had taken quite a different view of

(g) Bills of Exchange Act, s. 7 (3).

cited at p. 305, *supra*.

(h) [1891] A. C. 107.

(k) At p. 158.

(i) See also *Clutton v. Attenborough*,

(l) See note (f), at p. 365, *supra*.

the customer's mandate and the banker's obligation. At any rate, the ground of the decision is now part of the statute law. The Bills of Exchange Act, 1882, enacts (sect. 24) that, subject to certain provisions, which, for the present purpose, are immaterial, a forged or unauthorized signature on a bill is wholly inoperative, and that no right to retain the bill or to give a discharge therefor, or to enforce payment thereof against any party thereto, can be acquired through or under that signature, except in the case of an estoppel. Nothing but legislation could have relieved bankers from the liability attaching to them in accordance with the law as declared in *Roberts v. Tucker*. The fact that no such legislation has ever been promoted, or, I believe, advocated on behalf of bankers in the case of bills of exchange, though the law has been relaxed as regards cheques, seems to show that in the case of genuine bills the liability is of little or no practical importance.

"The drawee of a bill is bound to know the drawer's signature. It is his fault if he writes his acceptance on a forged instrument. And it is his act of acceptance which sends the bill forward for payment to the banker. In the case of a counterfeit bill, the payee's signature must be forged unless the person named as payee is an accomplice in the fraud. And, therefore, if there is no accomplice, assuming *Roberts v. Tucker* to apply, an acceptance making the bill payable at a bank necessarily entails upon the banker the loss of the sum for which the bill purports to be drawn. The banker has no chance of escape. Relying on his customer's acceptance, he takes it for granted that the bill is genuine. Ignorant of any danger, beyond the possible risk of a theft having been committed and remaining still undiscovered, he pays the apparent holder as a matter of course. It seems to me that if these premises are well founded, the Bank is entitled to be indemnified by Vagliano Brothers in respect of the money paid on the forged bills which Vagliano accepted and directed the Bank to pay. If A. employs B. on his behalf to deal with articles of a certain description in a particular way, and then A., through inadvertence or otherwise, introduces among the articles with which B. is to deal a dangerous counterfeit not distinguishable in appearance from its companions, I cannot doubt that A. is bound to indemnify B. against any loss resulting from his dealing

with the counterfeit as if it were a genuine article within the scope of his employment. And it cannot, I think, make any difference that B. is bound by the terms of his employment to bear every risk incident to his dealing with the genuine article.

“There is, I think, a wide distinction between this case and *Robarts v. Tucker*, though in both it was the duty of the bankers to pay bills of exchange accepted by their customers to the person who, according to the law merchant, was capable of giving a good discharge, and in both the bankers were cheated out of their money. In the one case the customer’s acceptance introduced to the bank a genuine mercantile instrument, though it had been tampered with by a thief without the fault or the knowledge of the customer. In the other, the acceptance introduced a fraudulent counterfeit, which the customer ought to have detected. In *Robarts v. Tucker* there was presented for payment a genuine bill bearing a forged indorsement. The bankers paid the wrong man, leaving the bill unpaid and the liability of the customer undischarged. They claimed credit all the same. But they did not pretend that they had done what they were told to do; nor could they allege that their employer had any hand in misleading them. Of course their claim was rejected. In the present case the bankers have not failed in the performance of any duty towards their customer. They undertook no duty, they accepted no mandate, in regard to pieces of paper which are not bills of exchange, and with which the law merchant has no concern. They, too, have been cheated out of their money. Whether they can say that they have done what they were told to do remains to be considered. At least they can say that their employers were active, though no doubt unconscious instruments, in carrying out the deception which led to their loss.” His Lordship then proceeded to discuss the question depending on the effect of sect. 7 (3) of the Bills of Exchange Act, and held, with the majority of the House, that the payee was a fictitious or non-existing person.

Forged indorsements of cheques have been dealt with in Part III. Chap. 8.

CHAPTER V.

ALTERATION AND CANCELLATION.

Alteration.

THE Bills of Exchange Act provides—

64.—(1.) Where a bill or acceptance is materially altered without the assent of all parties liable on the bill, the bill is avoided except as against a party who has himself made, authorized, or assented to the alteration, and subsequent indorsers.

Provided that,

Where a bill has been materially altered, but the alteration is not apparent, and the bill is in the hands of a holder in due course, such holder may avail himself of the bill as if it had not been altered, and may enforce payment of it according to its original tenor.

(2.) In particular the following alterations are material, namely, any alteration of the date, the sum payable, the time of payment, the place of payment, and, where a bill has been accepted generally, the addition of a place of payment without the acceptor's assent (*a*).

Permissible Alterations.—Where a cheque is drawn payable to a person named or bearer, the holder may alter the word “bearer” to “order” (*b*).

A blank indorsement may be altered by the holder into a special indorsement by writing above the indorser's signature a direction to pay to or to the order of himself or some other person (*c*).

The alteration of the crossing of a cheque is dealt with in sects. 77 and 78 of the Act (*d*).

(*a*) See also sects. 77, 78 of the Act. Upon the subject of alterations generally, see *Suffell v. Bank of England* (1882), 9 Q. B. D. 555.

(*b*) *Atwood v. Griffin* (1826), 2 C. & P. 368.

(*c*) Sect. 34 (4).

(*d*) See p. 244, *supra*.

Banker Paying Materially Altered Bill.—The banker's authority to pay an acceptance is limited to a payment according to the tenor of the bill as accepted subject to subsequent genuine indorsements. If, therefore, he fails to detect a material alteration, although no person in the ordinary course of business could detect it, he will, apparently, in all cases have to bear the loss (e).

Alteration of Sum Payable.—In *Adelphi Bank v. Edwards* (f) the defendant, Edwards, had accepted a bill for 22*l.* 10*s.*, which was written on a stamp sufficient to cover 300*l.* Spaces were left in the writing which enabled a fraudulent holder to increase the amount of the bill to 222*l.* 10*s.*, by inserting the figure “2” between the letter “£” and the figures “22” in the corner of the bill, and by adding the words “two hundred” at the end of one line and the word “and” at the beginning of the next. The plaintiff bank, having paid the increased amount, sued the acceptor. Chitty, J., was of opinion that the defendant had not been guilty of negligence. The learned judge, moreover, said: “The defendant, in my opinion, as a prudent man of business, was not bound to contemplate that the bill was coming into fraudulent hands, nor that by the perpetration of a crime it would be altered in the manner in which it has been altered.” In the Appeal Court the learned judges took the same view of the facts as Chitty, J., but they also negatived the existence of any rule or principle requiring the acceptor of a bill to exclude facilities for its alteration. Baggallay, L. J., said: “It seems to me impossible to say that there was any duty on the part of the acceptor of this bill towards the party who might subsequently become the holder of the bill, so to criticise, and so to examine the bill before he signed, as to put it out of the possibility of any additional words being afterwards inserted in it.” Brett, L. J., expressed the same opinions. Lindley, L. J., after referring to *Young v. Grote* (g), and “that class of cases,” proceeded thus: “We cannot say there was negligence here, unless we go the whole length of saying that

(e) *Hall v. Fuller* (1826), 5 B. & C. 750, cited at p. 278, *supra*; and the cases cited below in this chapter. See also *Smith v. Mercer* (1845), 6 Taunt. 76; 1 Marsh. 453.

(f) (1882), cited in [1896] A. C. at pp. 540—544.

(g) (1827), 4 Bing. 253. See pp. 278—282, *supra*.

it is negligence to sign a negotiable instrument so that somebody else can tamper with it. I cannot go that length. I think it would be wrong. There is no authority which compels us to do anything of the sort."

Referring to this case, Lord Halsbury said, in the case next cited: "I entirely concur with what Lindley, L. J., said in that case, that it was wrong to contend that it is negligence to sign a negotiable instrument so that somebody else can tamper with it." Lord Watson also said: "It is, no doubt, within the competency of this House to overrule the decision in *Adelphi Bank v. Edwards*; but I see no reason why your Lordships should do so."

In *Scholfield v. Earl of Londesborough* (*h*) a bill for 500*l.* was presented for acceptance with a stamp of much larger amount than was necessary, and with spaces left. The acceptor wrote his acceptance and handed the bill to the drawer, who fraudulently filled up the spaces and turned it into a bill for 3,500*l.* Being sued on the bill by a *bonâ fide* holder for value the acceptor paid 500*l.* into Court. The House of Lords held that he had been under no duty to the plaintiff to take precautions against forgery, and had been guilty of no negligence, and that he was accordingly entitled to judgment (*i*).

As to the position of a banker who, in consequence of the carelessness of a customer, pays money in reliance upon an altered cheque, reference should be made to pages 277—282, *supra*.

Cancellation.

The Bills of Exchange Act provides—

63.—(1.) Where a bill is intentionally cancelled by the holder or his agent, and the cancellation is apparent (*k*) thereon, the bill is discharged.

(2.) In like manner any party liable on a bill may be discharged by the intentional cancellation of his signature by the holder or his agent. In such case any indorser who would have had a right of recourse against the party whose signature is cancelled is also discharged.

(*h*) [1896] A. C. 514.

Bank (1873), 27 L. T. 849.

(*i*) See also *Imperial Bank of Canada v. Bank of Hamilton*, [1903] A. C. 49; and cf. *Société Générale v. Metropolitan*

(*k*) See *Ingham v. Primrose* (1859), 7 C. B. N. S. 82, cited at p. 259.

(3.) A cancellation made unintentionally, or under a mistake, or without the authority of the holder is inoperative; but where a bill or any signature thereon appears to have been cancelled the burden of proof lies on the party who alleges that the cancellation was made unintentionally, or under a mistake, or without authority.

The case of cancellation differs fundamentally from that of alteration. In the case of the former, the draft is the genuine order of the customer in the first instance; and, accordingly, if he wishes to withdraw that order, the onus is upon him to bring the alteration of his intention to the notice of his banker. If, therefore, a banker were to pay a bill or cheque which the customer who had accepted or drawn it had intended to cancel, but had not cancelled so as to make the cancellation apparent to an ordinarily careful banker, the customer would apparently have to bear the loss himself (*l*).

(*l*) As to the subject of cancellation in other connections, see *Novelli v. Rossi* (1831), 2 B. & Ad. 757; *Warwick v. Rogers* (1843), 5 M. & G. 340, 373, cited

at p. 316, *supra*; *Prince v. Oriental Bank Corporation* (1878), 3 A. C. 325, cited at pp. 83, 317; *Dominion Bank v. Anderson & Co.* (1888), 15 Sc. Sess. Cas. 4th ser. 408.

CHAPTER VI.

STAMPS.

Drafts Requiring Stamps.

THE Stamp Act, 1891 (*a*), extends the meaning of “Bill of Exchange,” for the purposes of stamp duty, as follows:—

32. For the purposes of this Act the expression “bill of exchange” includes draft, order, cheque, and letter of credit, and any document or writing (except a bank-note) entitling or purporting to entitle any person, whether named therein or not, to payment by any other person of, or to draw upon any other person for, any sum of money; and the expression “bill of exchange payable on demand” includes—

(a) An order for the payment of any sum of money by a bill of exchange or promissory note, or for the delivery of any bill of exchange or promissory note in satisfaction of any sum of money, or for the payment of any sum of money out of any particular fund which may or may not be available, or upon any condition or contingency which may or may not be performed or happen; and

(b) An order for the payment of any sum of money weekly, monthly, or at any other stated periods, and also an order for the payment by any person at any time after the date thereof of any sum of money, and sent or delivered by the person making the same to the person by whom the payment is to be made, and not to the person to whom the payment is to be made, or to any person on his behalf (*b*).

“It is obvious that these words include documents which would

(a) 54 & 55 Vict. c. 39.

(b) Cf. the definition given in sect. 3

of the Bills of Exchange Act. Instruments falling within either definition are liable to duty as bills of exchange.

not be called bills of exchange in ordinary parlance, and would not be bills of exchange at common law or under the Bills of Exchange Act" (e).

This section is not to be construed as if the first part contained a definition of bills of exchange other than those payable on demand, and the second a definition of bills of exchange payable on demand; but the first part applies to bills of exchange generally, and any document mentioned in it must, if payable on demand, be treated as coming within the second part (d).

A coupon has been held to come within this section (e).

So has a document issued by one banker to another directing a transfer of money from the account of the former to another account.

In *The Committee of London Clearing Bankers v. Commissioners of Inland Revenue* (f) a firm of bankers having an account at the Bank of England for the purpose of enabling a customer to pay customs duties on goods otherwise than in cash, issued a document addressed to the cashiers of the Bank of England, and directing them to transfer from the account of the bankers to the account of the Commissioners of Customs a sum named therein. This document was dealt with in one of two ways: (1) it was handed by the bankers to their customer in exchange for his cheque for the same amount, and given by him to the Commissioners of Customs, who handed it to the Bank of England; or (2) it was handed direct by the bankers to a Customs officer in exchange for their customer's cheque, and subsequently handed by the Commissioners of Customs to the Bank of England. It was held that the document was a bill of exchange payable on demand within the meaning of sect. 32 of the Stamp Act, 1891, and that it was not exempt from duty as being a "bill drawn in the United Kingdom for the sole purpose of remitting money to be placed to any account of public revenue" within the meaning of the 10th exemption under the head "Bill of Exchange" in the First Schedule to the Act. The Court were,

(e) Per Lindley, L. J., in *Committee of London Clearing Bankers v. Commissioners of Inland Revenue*, [1896] 1 Q. B. 542, at p. 547.

(d) See case referred to in last note.

(e) *Rothschild & Sons v. Commissioners of Inland Revenue*, [1894] 2 Q. B. 142. But see exemption (11) on p. 376, *infra*.

(f) [1896] 1 Q. B. 542.

moreover, of opinion that, having regard to the history of the exemption clause, the word "remit" only applied to the placing to its proper account money which was already public money (*g*).

Exemptions (*h*).

- (1.) Bill or note issued by the Bank of England or the Bank of Ireland.
- (2.) Draft or order drawn by any banker in the United Kingdom upon any other banker in the United Kingdom, not payable to bearer or to order, and used solely for the purpose of settling or clearing any account between such bankers.
- (3.) Letter written by a banker in the United Kingdom to any other banker in the United Kingdom, directing the payment of any sum of money, the same not being payable to bearer or to order, and such letter not being sent or delivered to the person to whom payment is to be made or to any person on his behalf.
- (4.) Letter of credit granted in the United Kingdom, authorizing drafts to be drawn out of the United Kingdom payable in the United Kingdom.
- (5.) Draft or order drawn by the Paymaster-General on behalf of the Court of Chancery in England or by the Accountant-General of the Supreme Court of Judicature in Ireland.
- (6.) Warrant or order for the payment of any annuity granted by the National Debt Commissioners, or for the payment of any dividend or interest on any share in the Government or Parliamentary stocks or funds.
- (7.) Bill drawn by any person under the authority of the Admiralty upon and payable by the Accountant-General of the Navy.
- (8.) Bill drawn (according to a form prescribed by His Majesty's orders by any person duly authorized to draw the same)

(*g*) See also *Buck v. Robson* (1878), 3 Q. B. D. 686; *Brice v. Bannister* (1878), 3 Q. B. D. 569.

(*h*) Stamp Act, 1891, Schedule—"Bill

of Exchange." But exemption (11) is in the modified form introduced by the Finance Act, 1894 (57 & 58 Vict. c. 30), s. 40.

upon and payable out of any public account for any pay or allowance of the army or auxiliary forces or for any other expenditure connected therewith (*i*).

- (9.) Draft or order drawn upon any banker in the United Kingdom by an officer of a public department of the State for the payment of money out of a public account (*i*).
- (10.) Bill drawn in the United Kingdom for the sole purpose of remitting money to be placed to any account of public revenue (*k*).
- (11.) Coupon or warrant for interest on a marketable security being one of a set of coupons whether issued with the security or subsequently issued in a sheet (*l*).

Promissory Notes.—The Stamp Act, 1891, extends the meaning of “Promissory Note,” for the purposes of stamp duty, as follows:—

33.—(1.) For the purposes of this Act the expression “promissory note” includes any document or writing (except a bank-note) containing a promise to pay any sum of money.

(2.) A note promising the payment of any sum of money out of any particular fund which may or may not be available, or upon any condition or contingency which may or may not be performed or happen, is to be deemed a promissory note for that sum of money (*m*).

(*i*) See Exchequer and Audit Departments Act, 1866 (29 & 30 Vict. c. 39), s. 18.

(*k*) See *Committee of London Clearing Bankers v. Commissioners of Inland Revenue*, cited at p. 374, *supra*.

(*l*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 40. A “marketable security” means a security of such a description as to be capable of being sold in any stock market in the United Kingdom: Stamp Act, 1891, ss. 122, 82. See Finance Act, 1899 (62 & 63 Vict. c. 9), s. 6.—Cf. *Rothschild & Sons v. Commis-*

sioners of Inland Revenue, [1894] 2 Q. B. 142, decided before the passing of the Finance Act, 1894; and *Australian Mortgage and Agency Co. v. Commissioners of Inland Revenue* (1888), 16 Sc. Sess. Cas. (4th ser.) 64.

(*m*) See the definition contained in sect. 83 of the Bills of Exchange Act. Instruments coming within either definition are liable to stamp duty as promissory notes.—Cf. *Brown, Shipley & Co. v. Commissioners of Inland Revenue*, [1895] 2 Q. B. 598; 64 L. J. M. C. 241; 73 L. T. 377.

The Amount of Duty.

The stamp duty is as follows:—

	<i>s.</i>	<i>d.</i>
BILL OF EXCHANGE payable on demand or at sight, or on presentation, or within three days after date or sight (<i>n</i>).	0	1
BILL OF EXCHANGE of any other kind (except a bank-note) and promissory note of any kind (except a bank-note) drawn, or expressed to be payable, in the United Kingdom—		

Where the amount or value of the money for which the bill or note is drawn or made does not exceed 5*l.*

Exceeds 5 <i>l.</i> , and does not exceed 10 <i>l.</i>	0	2
„ 10 <i>l.</i> , „ 25 <i>l.</i>	0	3
„ 25 <i>l.</i> , „ 50 <i>l.</i>	0	6
„ 50 <i>l.</i> , „ 75 <i>l.</i>	0	9
„ 75 <i>l.</i> , „ 100 <i>l.</i>	1	0
„ 100 <i>l.</i> ,		

For every 100*l.*, and also for any fractional part of 100*l.*, of such amount or value

1 0 (*o*)

BILL OF EXCHANGE drawn and expressed to be payable out of the United Kingdom (*p*) when actually paid or indorsed or in any manner negotiated in the United Kingdom—

Where the amount of the money for which the bill is drawn does not exceed 50*l.*

as above

Exceeds 50*l.*, and does not exceed 100*l.*

0 6

„ 100*l.*,

For every 100*l.*, and also for any fractional part of 100*l.* of that amount

0 6 (*q*)

Mode of Stamping.

In the case of a bill of exchange or promissory note drawn or made out of the United Kingdom, if payable on demand, either an

(*n*) Finance Act, 1899, s. 10 (2).

(*o*) Stamp Act, 1891, Schedule—“Bill of Exchange.”—The fact that interest is made payable by the instrument does not affect the amount of stamp duty: *Pruessing v. Ing* (1821), 4 B. & Ald. 204.

(*p*) A bill or note purporting to be drawn or made out of the United Kingdom is, for the purposes of stamp duty, to be deemed to have been so drawn or

made, although it may in fact have been drawn or made within the United Kingdom: Stamp Act, 1891, s. 36. The Isle of Man and the Channel Islands are out of the United Kingdom, and therefore within these provisions as to stamp duty. But such a bill is not a foreign bill within the meaning of the Bills of Exchange Act: see sect. 4 of that Act.

(*q*) Finance Act, 1899, s. 10 (1).

adhesive or an impressed stamp may be used, and, if payable otherwise, an adhesive stamp must be used (*r*).

The stamp must be affixed and cancelled by the person into whose hands it comes in the United Kingdom before it is stamped, before he presents it for payment or indorses, transfers, or in any manner negotiates or pays the bill or note (*s*). If the bill is payable on demand (*t*), a penny "Postage and Inland Revenue" stamp should be used. In other cases, the "Foreign Bill or Note" appropriated stamp should be used (*u*).

The stamp may be either adhesive or impressed in the case of inland bills of exchange (including cheques) payable on demand (*x*). If adhesive, it should be cancelled by the person who signs it before he delivers it out of his hands, custody or power (*y*).

The appropriated stamp must be impressed in the case of other inland bills of exchange (*z*) and of all inland promissory notes (*a*).

It may be either adhesive or impressed in the case of protests of bills of exchange or promissory notes (*b*). If adhesive it is to be cancelled by the notary (*b*).

The Stamp Act, 1891, provides—

8.—(1.) An instrument, the duty upon which is required or permitted by law to be denoted by an adhesive stamp, is not to be deemed duly stamped with an adhesive stamp, unless the person required by law to cancel the adhesive stamp cancels the same by writing on or across the stamp his name or initials, or the name or initials of his firm, together with the true date of his so writing, or otherwise effectively cancels the stamp and renders the same incapable of being used for any other instrument, or for any postal purpose, or unless it is otherwise proved that the stamp appearing on the instrument was affixed thereto at the proper time.

(2.) Where two or more adhesive stamps are used to denote the stamp duty upon an instrument, each or every stamp is to be cancelled in the manner aforesaid.

(*r*) Stamp Act, 1891, ss. 2, 34 (2).

(*s*) *Ibid.* s. 35 (1). See *Griffin v. Weatherby* (1868), L. R. 3 Q. B. 753.

(*t*) See *In re Boyse, Crofton v. Crofton* (1886), 33 Ch. D. 612; 56 L. J. Ch. 135.

(*u*) See *Alpe's Law of Stamps*, 9th ed. p. 79.

(*x*) Stamp Act, 1891, s. 34 (1).

(*y*) *Ibid.* But see sect. 38 (2).

(*z*) *Ibid.* s. 2. As to bills payable not more than three days after sight this is doubtful: see Finance Act, 1899 (62 & 63 Vict. c. 9), s. 10 (2).

(*a*) Stamp Act, 1891, s. 2.

(*b*) *Ibid.* s. 90.

34.—(1.) The fixed duty of one penny on a bill of exchange payable on demand or at sight or on presentation may be denoted by an adhesive stamp, which, where the bill is drawn in the United Kingdom, is to be cancelled by the person by whom the bill is signed before he delivers it out of his hands, custody, or power.

(2.) The *ad valorem* duties upon bills of exchange and promissory notes drawn or made out of the United Kingdom are to be denoted by adhesive stamps.

35.—(1.) Every person into whose hands any bill of exchange or promissory note drawn or made out of the United Kingdom, comes in the United Kingdom before it is stamped shall, before he presents for payment, or indorses, transfers, or in any manner negotiates, or pays the bill or note, affix thereto a proper adhesive stamp or proper adhesive stamps of sufficient amount, and cancel every stamp so affixed thereto.

(2.) Provided as follows:

(a) If at the time when any such bill or note comes into the hands of any *bonâ fide* holder there is affixed thereto an adhesive stamp effectually cancelled, the stamp shall, so far as relates to the holder, be deemed to be duly cancelled, although it may not appear to have been affixed or cancelled by the proper person;

(b) If at the time when any such bill or note comes into the hands of any *bonâ fide* holder there is affixed thereto an adhesive stamp not duly cancelled, it shall be competent for the holder to cancel the stamp as if he were the person by whom it was affixed, and upon his so doing the bill or note shall be deemed duly stamped, and as valid and available as if the stamp had been cancelled by the person by whom it was affixed.

(3.) But neither of the foregoing provisoes is to relieve any person from any fine or penalty incurred by him for not cancelling an adhesive stamp.

37.—(1.) Where a bill of exchange or promissory note has been written on material bearing an impressed stamp of sufficient amount but of improper denomination, it may be stamped with the proper stamp on payment of the duty and a penalty of forty shillings if the bill or note be not then payable according to its tenor, or of ten pounds if the same be so payable.

(2.) Except as aforesaid, no bill of exchange or promissory note shall be stamped with an impressed stamp after the execution thereof.

39. When a bill of exchange is drawn in a set according to the

custom of merchants, and one of the set is duly stamped, the other or others of the set shall, unless issued or in some manner negotiated apart from the stamped bill, be exempt from duty; and upon proof of the loss or destruction of a duly stamped bill forming one of a set, any other bill of the set which has not been issued or in any manner negotiated apart from the lost or destroyed bill may, although unstamped, be admitted in evidence to prove the contents of the lost or destroyed bill.

Penalty for Default.

The Stamp Act, 1891, provides—

8.—(3.) Every person who, being required by law to cancel (c) an adhesive stamp, neglects or refuses duly and effectually to do so in the manner aforesaid, shall incur a fine of ten pounds.

38.—(1.) Every person who issues, indorses, transfers, negotiates, presents for payment, or pays any bill of exchange or promissory note liable to duty and not being duly stamped shall incur a fine of ten pounds, and the person who takes or receives from any other person any such bill or note either in payment or as a security, or by purchase or otherwise, shall not be entitled to recover thereon, or to make the same available for any purpose whatever.

(2.) Provided that if any bill of exchange payable on demand or at sight or on presentation, is presented for payment unstamped, the person to whom it is presented may affix thereto an adhesive stamp of one penny, and cancel the same, as if he had been the drawer of the bill, and may thereupon pay the sum in the bill mentioned, and charge the duty in account against the person by whom the bill was drawn, or deduct the duty from the said sum, and the bill is, so far as respects the duty, to be deemed valid and available (d).

(3.) But the foregoing proviso is not to relieve any person from any fine or penalty incurred by him in relation to such bill.

(c) Cancellation by a die or stamping instrument is sufficient: *Viale v. Michael*

(1874), 30 L. T. N. S. 463.

(d) See p. 245, *supra*.

CHAPTER VII.

REMITTANCES TO MEET ACCEPTANCES.

As a general rule, cash paid by a customer into his current account and the proceeds of cheques, bills and other orders for the payment of money handed to his banker for collection are in law lent by the customer to the banker. Accordingly, the customer has merely a personal right against the banker in respect of such sums. He cannot claim them in specie. If the banker or banking company fails, he can only prove in the bankruptcy or winding-up and receive a dividend rateably with other creditors (a).

Specific Appropriation.

Bills.—Where, however, a customer specifically appropriates bills payable to him and remitted by him to his banker to the purpose of meeting acceptances of his or of the banker on his behalf, it is otherwise. In this case he remains owner of the bills remitted by him until, and subject to, the carrying out of the purpose designated.

In *Jombart v. Woollett* (b) a merchant abroad sent drafts from time to time to his London correspondent for acceptance, under an authority for that purpose, and upon an understanding that the liabilities of the latter in respect of all such acceptances should be covered by means of bills payable in London to be remitted to him from time to time. It was laid down that under such an arrangement, the presumption was, until an agreement to the contrary was shown, that the London correspondent was not intended or entitled to treat the bills so remitted as cash, or to discount them before maturity; and it was accordingly held that two of such

(a) See Part II. Chap. 2.

(b) (1837), 2 My. & C. 390.

bills, which were existing in specie in his hands at the time of his bankruptcy, and were not then due, did not pass to his assignees, but were the property of the party who had remitted them.

In giving judgment the Lord Chancellor said: "Unless there be a contract to the contrary, if a person, having an agent elsewhere, remits to him, for a particular purpose, bills not due, and that purpose is not answered, and then the agent carries them to account, and becomes a bankrupt, the property in the bills is not altered, but remains in the party making the remittance. That of course may be regulated by usage, but *primâ facie*, without special contract, the presumption is, that the bills are received by the agent for the purpose of indemnifying him against any eventual loss, and are not to be dealt with as his own, and immediately converted into cash. . . . In order to make good the title of the assignees, and to displace the title of the remitters of the bills, it would be necessary to establish, from the correspondence, a contract entitling the London house to make the bills their own. The cases show, that, unless there was such a contract, the London house were agents only for receiving the amount of the bills when due. Instead of containing any authority to the London agent to deal with the bills as his own, the correspondence proves the very reverse to have been the understanding of both parties. The only obligation of the foreign house was to keep the London agent in cash to meet the bills when due. It was not intended to establish a cash balance in his hands. . . . Here are the bills not disposed of, not discounted, and the obligation not performed. I think, therefore, that the foreign house have clearly established their title."

In *Thayer v. Lister* (c) E. T., carrying on business on his own account in America, and being also a partner in the firm of T. & Co. in England, drew bills on T. & Co., which he employed T. & B., another American firm, to sell for him, undertaking to provide T. & Co. with remittances to meet them at maturity. T. & B., in accordance with their usual course of dealing with E. T., indorsed the bills and sold them, giving to E. T. bills on their agent in England for the amount. E. T., being on the eve

of insolvency, sent the bills so received from T. & B. to the English firm of T. & Co., with instructions to accept the bills drawn by himself and to hold the remittances for the purpose of meeting the payment thereof. On receipt of the remittances, T. & Co. accepted the bills drawn by E. T., and, disregarding the instructions, handed the bills of T. & B. to L., in accordance with a previous promise made to him, in order to enable him to meet some liabilities incurred by him on behalf of T. & Co. It was held, that these bills were specifically appropriated by E. T. to meeting the bills drawn by him; that T. & Co. had received the remittances as agents of E. T., who had remitted them in a character distinct from his partnership in the firm of T. & Co.; that consequently T. & Co. had no authority to apply the remittances to any other purpose than that directed; and that L., who was held on the evidence to have had notice of the specific appropriation, was bound to account to T. & B. for the proceeds.

In *Steele v. Stuart* (d) a manufacturer, A., proposed to a firm of B. and C., who were the home agents of A.'s foreign consignees, that they should make advances to him against the consignments, and that "the proceeds of sales, above the advances," should go to the liquidation of an old claim of B. and C. against A. B. and C. assented to this arrangement by a letter which, after stating that there were two ways of making advances—one for A. to draw on B. and C., and take their acceptances, and negotiate them; the other for B. and C. to advance cash to A., and draw on A. for the amounts, A. to accept, and B. and C. to negotiate—concluded thus: "and we shall retire that acceptance from proceeds of the sales." In pursuance of this arrangement, A. directed his consignees to remit to B. and C., and B. and C. made advances to A. by drawing on him, negotiating his acceptances, and remitting the proceeds to him. Afterwards B. and C., being in want of money, directed the consignees to remit, not to themselves, but to a firm of bankers, C. and D. (having a common partner with themselves), as a security for advances made by C. and D. to B. and C. Upon B. and C. becoming bankrupt, it was held, that C. and D. had notice of the arrangement between A. and B. and C., through the fact of the

common partner; and that, upon the construction of the contract, the remittances in the hands of C. and D. were appropriated in equity, first to the payment of A.'s acceptances, and subject thereto, to the discharge of the old claim.

In *Seligmann v. Huth* (c) the defendants, bankers in London, agreed with K. & Co., merchants in New York, to open a credit account in favour of K. & Co. upon the terms that the defendants would accept drafts upon themselves by K. & Co. to be drawn against shipping documents for shipments of cotton by K. & Co. to Liverpool, and also against simultaneous remittances of bills on houses of first-rate standing without any bills of lading attached. The defendants charged K. & Co. a commission on all transactions effected under this agreement. The credit was subsequently divided into two accounts, A. and B., account A. being for drafts against simultaneous remittances, and account B. for drafts against blank credits and shipping documents. After the separate accounts were opened K. & Co. drew drafts upon, and made remittances to, the defendants in respect of each account; and K. & Co. enclosed each remittance in a letter to the defendants specifying, almost invariably, the account to which it was to be credited, and each draft was also notified by a letter specifying the account to which it was to be debited. The defendants, in reply to such letters, notified the remittances and drafts to have been credited or debited to the respective accounts as directed. On the 22nd September, 1874, K. & Co. forwarded to the defendants two bills on mercantile firms, and advised two drafts by themselves at sixty days upon the defendants. By a letter enclosing the bills and advising the drafts K. & Co. directed the defendants to place the bills to K. & Co.'s credit, and the drafts to their debit, in account A. Before the defendants received the bills and letter K. & Co. stopped payment, and were afterwards adjudicated bankrupts under the law of the United States, and their property vested in the plaintiffs, who were assignees in bankruptcy. At the time K. & Co. stopped payment a considerable balance was due to the defendants on account B. The defendants refused to accept K. & Co.'s two drafts on them of the 22nd September, and having retained the two bills until they

became due received payment on them and refused to give up the acceptances to the plaintiffs or to pay over to them any part of the proceeds. It was held that the defendants held the two bills upon the condition precedent that they would accept the plaintiffs' drafts upon themselves, and that, the condition having been broken, the plaintiffs were entitled to recover the proceeds of the two bills which the defendants had wrongfully converted to their own use; and also that the defendants were not entitled to any set-off or counterclaim against the plaintiffs in respect of the balance due to the defendants on account B. at the time of the bankruptcy.

In *Ex parte Gomez, In re Yglesias (f)*, G. was in the habit of drawing bills on Y., and of sending him bills to put him in funds to meet them. A separate account of these transactions was kept, styled "No. 1 account," and the letters inclosing the remittances directed them to be placed to G.'s credit in account No. 1. Accounts were made out half-yearly. Each remittance was entered under the date when the bill came to hand, but if it became payable before the close of the account, G. was credited with interest for the interval between the day of its falling due and the close of the account. If it fell due after the close of the account, he was debited with interest for that period. If a remitted bill was dishonoured, G. was debited with the costs, and entries of principal and interest were made on the opposite side of the account so as virtually to strike the bill out of the account. Y. stopped payment, and made a statutory composition of 3s. 4d. in the pound with his creditors, including the holders of his outstanding acceptances for G. At the time of the stoppage, if he was credited with only 3s. 4d. in the pound on these acceptances, the balance was in favour of G., without taking into account a number of bills remitted by G. and still remaining in specie. G., who was domiciled in Spain, shortly afterwards entered into some composition with his creditors, but its nature did not appear. The registrar decided that the remittances remaining in specie belonged neither to the bill holders nor to G., but to Y. G. appealed, but the bill holders did not. It was held that the

(f) (1875), 10 Ch. 639.

remittances were appropriated to No. 1 account, and that, as Y. had been fully reimbursed all that he had paid or was liable to pay for G. on that account, the remittances remaining in specie belonged to G. (*g*).

Cash.—It may, perhaps, be the same with regard to cash if, upon the facts, it is possible to say that a particular fund has been specifically appropriated.

In *Farley v. Turner* (*h*) Goodwin, having to pay a bill which he had accepted payable at Robarts & Co.'s, paid into his bankers' at Kidderminster 707*l.* in addition to the balance then standing to his credit. At the time he gave directions to the clerk that 500*l.* of this money was lodged for the purpose of paying a bill which was to become due at Robarts & Co.'s on the 14th of the month. He also left this notice: "Messrs. Farley, Turner & Jones. Advise Messrs. Robarts, Curtis & Co. to pay, as under, my acceptance, dated October the 11th, at two months, due December the 14th, to J. & C. Sturge. 500*l.*—(Signed) D. W. Goodwin."

In pursuance of these instructions, advice was immediately forwarded by the Kidderminster Bank to Messrs. Overend & Gurney to pay 500*l.*, part of the produce of various bills sent to them to discount, to Messrs. Robarts & Co., to meet Mr. Goodwin's acceptance. This was done on the 11th of December, and on the morning of the 12th Robarts & Co. received information of the death of Turner, one of the firm of Farley, Turner & Jones, which took place on the evening of the 11th. The firm ceased to carry on business. Accordingly the 500*l.* was not applied in payment of the acceptance of Mr. Goodwin, but was paid over to the representatives of Turner's estate. It appeared that the 707*l.* had been carried to Mr. Goodwin's general banking account. The question was raised whether the 500*l.* belonged to Mr. Goodwin or to the general creditors of the bank.

Vice-Chancellor Kindersley held that the 500*l.* had been specifically appropriated, and accordingly belonged to Goodwin. "It appears to me," said his Honour, "that the course pursued was

(*g*) See the cases decided upon the rule in *Ex parte Waring*, at pp. 390—398, *infra*.

(*h*) (1857), 26 L. J. Ch. 710; 3 Jur. N. S. 532.

the same as if, having no occasion to pay more than the 500*l.* bill, they" (Farley, Turner & Jones) "had simply sent up the specific amount with a direction to pay that particular bill. It is true that the money was not ear-marked as if it had been locked up in a box, but it is a portion of the 707*l.* which had been paid in expressly for the purpose of meeting the bill for 500*l.*" (i).

But it will be difficult to establish a case of specific appropriation of cash, or of the proceeds of bills which have been properly converted into cash by the banker to whom they have been remitted.

In *Chartered Bank of India, Australia and China v. Evans* (k) the respondents, assignees of a bankrupt, sued the appellants to recover a sum belonging to the bankrupt, and alleged to have been in the appellants' hands at the date of adjudication of bankruptcy. This sum, in pursuance of an agreement between them and the bankrupt previously to adjudication, had been carried by the appellants to a special account as security against bills not yet at maturity drawn by the bankrupt and discounted by the appellants. It was held that the action failed, as by the contract the sum claimed formed no part of the bankrupt's estate, but was rightly in the hands of the appellants at the time of the action. The state of circumstances was such that it was consistent with the contract that the sum should be in the hands of the bank.

In *In re Broad, Ex parte Neck* (l), a banker in London was in the habit of accepting for the accommodation of a customer, a merchant in Sweden, bills drawn on him by the merchant, who used to remit other bills to the banker to put him in funds to meet the acceptances when they became due. The banker, with the knowledge of the customer, generally discounted the remitted bills before they fell due, and paid the proceeds to his current account with his own bankers. He rendered yearly accounts to the customer, and in those accounts he credited him with interest on the amounts of the remitted bills from their due dates, and debited him with interest on the amounts which he paid in discharge of the acceptances. The amounts of the bills remitted by the customer did not always exactly correspond with the amounts of the

(i) See also *Vaughan v. Halliday* (1874), 9 Ch. 561, and other cases cited at pp. 390—398, *infra*.

(k) (1869), 21 L. T. 407.

(l) (1884), 13 Q. B. D. 740.

acceptances which they were intended to cover. In April, 1883, the banker accepted a bill for 450*l.* drawn on him by the customer, and maturing on the 21st of July. On the 13th of July the customer sent to the banker a bill for 450*l.* upon W., of London, payable at sight. This bill was received by the banker on the 17th of July, and the proceeds were paid to his bankers and carried to his current account. On the 20th of July the banker stopped payment. His acceptance for 450*l.* was dishonoured the next day, and the customer had to pay it. In November, 1883, the banker filed a liquidation petition. It was held that the remitted bill for 450*l.* was not specifically appropriated to meet the banker's acceptance for 450*l.*, and that, as the amount of the bill had been received by the banker before the commencement of the liquidation, the customer was not entitled to the proceeds in specie, but could only prove for the amount as a debt in the liquidation. Lords Justices Baggallay and Cotton, however, expressed the view that, if the remitted bill had remained in specie at the commencement of the liquidation, the customer would, on retiring the acceptance, have been entitled to have the bill returned to him (*m*).

Position of Banker's Correspondent.—A specific appropriation as between the customer and his banker will not in itself amount to a specific appropriation as between the latter and his correspondent.

In *Bolton v. Puller* (*n*) A., B., C. and D. were partners in a banking-house at Liverpool. C. and D. also carried on a separate mercantile concern in London. J. S. having accepted bills payable at the house of C. and D., employed A., B., C. and D. to get them paid accordingly, and agreed to deposit with them good bills indorsed by him, for the purpose of enabling them so to do. A., B., C. and D. debited J. S. in account for his acceptances and credited him for all the bills which he deposited. Some of the bills so deposited by J. S. were remitted by A., B., C. and D. to C. and D. upon the general account between the two houses, and before any of the acceptances of J. S. became due both houses

(*m*) See also *In re Gothenburg Commercial Co.* (1881), 29 W. R. 358; *Ex parte Dever*, *In re Suse* (1884), 13 Q. B. D. 766, cited in Part VI. Chap. 4: *Phelps*,

Stokes & Co. v. Comber (1885), 29 Ch. D. 813; *Stumore v. Campbell & Co.*, [1892] 1 Q. B. 314.

(*n*) (1796), 1 B. & P. 539.

failed, and J. S. was obliged to pay his own acceptances. It was held that the assignees of C. and D. were entitled to retain against J. S. the bills remitted to them by A., B., C. and D., and also that it made no difference that one of the bills remitted did not arrive in London till after the bankruptcy of C. and D., though sent by A., B., C. and D. before that event (*o*).

In *Johnson v. Roberts* (*p*) customers of country bankers paid in to the bankers' a sum of money in bank-notes, and also some bills of exchange to be remitted to London in order to meet certain acceptances. The bankers sent to their London agents the bills and some bank-notes, with a letter directing them to pay a certain sum of money, and also giving them notice of the acceptances as payable at their bank and directions as to other business. The country bankers stopped payment, owing a large balance to the London bankers. It was held that, as between the country customers and the London bankers, there was no appropriation of the bills and notes to meet the acceptances, and that the London bankers could retain the bills and notes without meeting the acceptances (*q*).

Upon the subject of appropriation of drafts, reference should be made to the remainder of this chapter, and also to Chap. 7 of Part V. (*r*).

Double Insolvency.

Rule in Ex parte Waring.—Where the customer has remitted bills or given other securities to his banker to meet acceptances and both become insolvent, the securities held by the banker are available to the holders of the acceptances which the securities have

(*o*) It is to be observed that in this case the bills delivered to A., B., C. and D. were intended by J. S. to be converted into cash by them in order to increase the amount to his credit with them. Accordingly there was, perhaps, no specific appropriation even as against them. But see as to this, pp. 386—388, *supra*.

(*p*) (1875), 10 Ch. 505.

(*q*) Cf. *Farley v. Turner*, cited at p. 386, *supra*.

(*r*) The subject of appropriation is somewhat obscured by the judgment in *Banco de Lima v. Anglo-Peruvian Bank* (1878), 8 Ch. D. 160. Apparently the *ratio decidendi* there should have been simply that the defendants, having taken a bill of exchange and a bill of lading as holders for value without notice of any defect in the title of their transferor, were protected against the claim of the person whose rights were infringed by the transfer.

been remitted to meet. This was established by the decision in *Ex parte Waring* (s).

"The case of *Ex parte Waring* (s) was this: B. & Co. had an account with their bankers, drawing bills upon them and depositing securities against their drafts. The bankers stopped payment in July; they were under acceptances for B. & Co. for 24,000*l.*, and there was in their hands also a cash balance in favour of B. & Co. exceeding 6,700*l.*, and they had also in their hands short bills belonging to B. & Co. exceeding 21,600*l.*, and also the title deeds of premises in London, belonging to B. & Co., worth about 3,000*l.* The result of the account, therefore, was that, when the acceptances were paid by the bankers, they held securities to meet them worth about 600*l.* more than the acceptances amounted to, and the bankers would also, besides, owe B. & Co. the balance of their account, exceeding 6,700*l.* In August, as might have been expected from this statement, B. & Co. also became bankrupt. It was decided by Lord Eldon that the holders of the bills accepted by the banking company were entitled to have the produce of the securities deposited by B. & Co. specifically applied in payment of those bills, on the ground that the estate of the bankers must be cleared of the demand by their acceptances, and that the surplus of the produce of the securities, after answering the demand upon them, must be made good to B. & Co., and that this equity could only be accomplished by paying to the bill holders the amount realized by the sale of the securities, to the extent of satisfying the amount due on the bills, or as far as such produce of the sale of the securities would extend" (t).

The rule was explained by Lord Chancellor Hatherley in *City Bank v. Luckie* (u) as follows: "If a person gives a security for the payment of any debt constituted, amongst other things, by bills upon which his creditor has made himself liable in order to advance money to the debtor, then, in the case of both parties becoming insolvent, the question arises which Lord Eldon solved in *Ex parte Waring*, namely, whether the estate of a person who, by becoming insolvent, was not able to pay the bills, could claim

(s) (1815), 19 Ves. 345; 2 Rose, 182.

(t) Per Lord Romilly, M. R., in *In re New Zealand Banking Corporation, Hickie*

& *Co.'s Case* (1867), 4 Eq. 226.

(u) (1870), 5 Ch. 773, at p. 776.

the benefit of the security, the bills remaining unpaid. The holders of the bills, of course, would say that they were in the position of the holder of the security, though not by virtue of any contract with him, because there was no contract in respect of the bills, for as long as both parties were solvent, he who gave the security, and he who received the security, might deal with the security just as they pleased, without any regard to who might be the bill holders. But when there came to be a question whether the bills were to be paid or not, it was impossible for the estate, which claimed the value of the security, subject to the charge, to get back the security, unless all the duties that attached to it had been fulfilled. On the other hand, the other estate was not in a condition to make payment of the bills, and thus to come upon the security for indemnity. Therefore matters stood at a deadlock, and nothing could be done on one side or the other. Lord Eldon, in *Ex parte Waring*, solved the difficulty by saying it was true that these were bills which were not paid, but, inasmuch as the estate of the debtor could not be withdrawn until the bills were paid, and inasmuch as the estate of the creditor holding the security was in such a condition that he was not able to make payment of the bills in money's worth, the only way was to dispose of the security and pay the bills. That is a very simple proposition; and, as Lord Cranworth has well pointed out in the case of *Powles v. Hargreaves* (x), the difficulty does not arise if either party is solvent. The bill holder comes in, not on account of any special lien he has upon the property, but because the person from whom he holds has a security, which security cannot be taken away until all liability upon the bills is at an end."

In the case in which the above explanation of the rule in *Ex parte Waring* was given, K. & Co. accepted bills for L. & Co., and L. & Co. mortgaged to K. & Co. an estate in Guiana to secure a cash credit, granted by K. & Co., to the extent of 75,000 dollars. There was a general current account between the two firms. K. & Co. and L. & Co. each became insolvent. It was held that, under the circumstances, the mortgage was a security for money advanced to meet the bills, and that the holders of the bills were entitled to the benefit of the mortgage securities, and to have the money

(x) (1853), 3 De G. M. & G. 430.

received from the mortgage security applied in payment of the bills.

The Lord Chancellor, after expressing himself in the language cited above, proceeded: "It is said, however—and this seems to have been the view of the Vice-Chancellor in the Court below—that the security is only for the balance of a cash account. It seems to me utterly immaterial what is the form which the debt assumed, if, amongst other things, you find upon investigating the account that the creditor who claims the balance of the cash account has pledged his credit for the purpose of having that cash advanced, which he seeks to be paid."

In *Ex parte Dewhurst, In re Leggatt, In re Gledstanes (y)*, two distinct firms, L. & Co. of Bombay, and G. & Co. of London, were engaged in a joint adventure for buying and selling goods in England and India. The course of business as to the homeward shipments was that L. & Co. drew bills on G. & Co. which they discounted in India, and with the proceeds purchased cotton, which they consigned to G. & Co. specially to meet the acceptances. Both firms stopped payment and went into liquidation. The holders of unpaid acceptances of G. & Co., which had been drawn in this way, claimed to have the proceeds of certain shipments of cotton specially appropriated to meet the acceptances. It was held that the bill holders were entitled to have the cotton specifically appropriated, upon the principle of *Ex parte Waring*, but subject to the rights of the creditors, if any, of the aggregate firms to have the cotton applied as part of the aggregate assets (z).

It is no objection to the application of the rule of *Ex parte Waring* that the party sending the remittances was not a party to the bills as drawer or indorser, provided the bills were drawn in respect of a transaction on which he is liable.

Thus, in *Ex parte Smart, In re Richardson (a)*, L. & Co. employed S. & Co. as their correspondents at Havannah, and R. as their correspondent in London. They consigned certain cargoes to S. & Co., at the same time informing them that they would draw bills on R. for the value. This they accordingly did, and

(y) (1873), 8 Ch. 965.

(z) See also *Ex parte Carrick* (1858), 2 De G. & J. 208; *Banner v. Johnston*,

In re BARNED'S BANKING CO. (1871), L. R. 5 E. & I. A. 157.

(a) (1872), 8 Ch. 220.

the bills were accepted by R. Before the bills came to maturity S. & Co. sent remittances in short bills to R. to cover the amount of the bills, telling him to take them "against the acceptances." R. became bankrupt, and the acceptances were not paid, and soon after S. & Co. became insolvent. It was held that the remittances must be applied to meet the acceptances, under the rule of *Ex parte Waring*.

Conditions of Application of Rule.—The rule in *Ex parte Waring* will only apply where (1) the bills drawn upon the bank, or payable at the bank, have been accepted, and the holder has a right of double proof; (2) there has been a specific appropriation of securities belonging to the customer in the banker's hands to meet the bills payable by him; and (3) proceedings in the nature of bankruptcy have been taken against both customer and banker.

I. Right of Double Proof Essential.—The rule is only applicable when the bills drawn upon the bank, or payable at the bank, have been accepted, and the holder has a right of double proof.

In *Vaughan v. Halliday* (b) R. & Co., of Brazil, in the course of exchange operations with A., of Manchester, drew bills on him for 2,000*l.* which they sold to the plaintiff, and about the same date transmitted to A. acceptances of another house for 1,900*l.* to cover the bills drawn. Before the covering remittances reached England, R. & Co. stopped payment and presented a petition for liquidation. A. being also in difficulties refused to accept the bills drawn on him, and also became a liquidating debtor. The plaintiff, as holder of the dishonoured bills, filed a bill against the trustees of the estates of R. & Co. and A., praying that the remittances might be applied in payment of the bills. It was held that the plaintiff had no equity to support the bill.

Lord Justice Mellish said: "It appears to me utterly impossible to put any construction on the letter which accompanied the remittances except that the bills remitted were specifically appropriated to take up the acceptances, if Ashton did accept them. Then the rule of law is applicable, that if a remittance is sent for a particular purpose, whether it be a remittance by bill or a remittance in money, the person who receives the remittance must either

(b) (1874), 9 Ch. 561.

apply it for the purpose for which it was sent, or else return it. Therefore, as soon as Ashton determined not to accept the bills he was bound to return the remittances. He has incurred no liability, and I cannot see how *Ex parte Waring* can possibly apply. . . . Where there is no right of double proof, whatever may be the equities as between the two firms that are insolvent, I cannot see how there can be any difficulty in settling those equities between the parties without the necessity of giving to the bill holder, who is simply a creditor without any security, that security which he has never bargained for."

II. Specific Appropriation Necessary.—The rule will only apply if there has been a specific appropriation of the customer's property in the banker's hands to meet the bills payable by the latter.

In *Ex parte Banner, In re Tappenbeck (c)*, a firm of merchants in England employed a firm of merchants in South America as their agents to purchase goods and send them to England. The foreign firm drew bills on the English firm and sold them in South America, and with the proceeds purchased goods which they shipped to England, sending the bills of lading directly to the English firm, and at the same time advising them of the drawing of the bills, by means of which they had purchased the goods, and requesting them to carry the invoice price of the goods to their account. The English firm went into liquidation, and the foreign firm also became bankrupt. When the English firm stopped payment a cargo of goods was *in transitu*, and some of the bills drawn for purchasing them had been accepted by the English firm, but not paid, and others had not been accepted. The trustee in the liquidation took possession of the cargo on its arrival. The creditors of the foreign firm claimed to have the goods appropriated to meet the bills drawn in respect of them. It was held that the foreign firm, whether regarded as the agents of the English firm or as vendors, had parted with all property in the goods, and had no power to direct the appropriation of the proceeds; and, therefore, no equity arose on the insolvency of the two firms in favour of the holders of the bills to have the proceeds applied in payment of the bills

under the doctrine of *Ex parte Waring*. A direction by a consignor to a consignee to place the invoice price of goods to his credit and the bills drawn against them to his debit does not amount to an appropriation of the goods to protect the bills (*d*).

Lord Justice Mellish, delivering the judgment of the Court of Appeal, said: "In considering this question whether there was a specific appropriation of each lot of goods to take up particular bills, it is necessary to bear in mind that this is not a case of a principal consigning goods to his agent for sale on account of the principal, but of the agent consigning goods to his principal, and there appears to us to be a very material distinction between the two cases which has not been sufficiently considered in the Courts below. When a principal consigns goods to his agent for sale, the goods in the hands of the agent remain the property of the principal, subject to any charge which the agent may have on them; and if the principal draws bills upon the agent specifically against the goods, that gives the agent a right to apply the proceeds of the goods when sold in payment of the bills, but subject to that charge the goods and the proceeds of the goods remain the property of the principal. Where, however, an agent in one country purchases goods on account of his principal, and consigns them to him in another country, if the agent allows the property in the goods and the possession of the goods to pass to his principal, the goods become the absolute property of the principal, and the agent, in the absence of an express agreement to the contrary, has no lien or charge upon them in the hands of his principal. Nor does it, in our opinion, in the absence of fraud, make any difference that the agent draws a bill upon his principal for the express purpose of obtaining payment of the price of the goods, and that the principal refuses to accept the bill unless the agent has taken the precaution of making the goods by the bill of lading deliverable to his own order, and has transmitted the bill of lading to an agent of his own, with directions not to hand it over to the principal unless the bill of exchange is accepted. We think that the right of an agent in such a case over the goods, as against his principal,

(*d*) *Shepherd v. Harrison* (1871), L. R. 5 E. & I. A. 116, was distinguished in this case.

is the same as that of a vendor as against a purchaser. If the agent gives credit to the principal, and transfers the property in the goods and the right to obtain possession of the goods by means of the bill of lading to his principal, and fails to stop the goods *in transitu*, the trustee of the principal, in the event of his bankruptcy, is entitled to the goods. . . . Where the consignor directs the consignee to apply the proceeds of the goods in a particular way, the consignor still remains the owner of the goods, and if he directs the proceeds to be carried to his credit in a particular account, and the bills to be placed to his debit in the same account, that may amount to a direction to apply the proceeds of the bills in taking up the bills of exchange. Where, however, a consignor sells goods to a consignee and directs him to carry the invoice price of the goods, that is, the debt due from the consignee to the consignor for the price of the goods, to a particular account, that does not involve a direction to deal with the goods themselves or the proceeds of the goods in any particular way. On the contrary, it admits that the goods themselves are the property of the consignee, and if the invoice price of the goods is placed on one side of an account to the credit of the consignor, and the bills of exchange drawn in respect of the price of the goods are placed on the other side of the account, the only effect is that when the bills of exchange are paid by the consignee the debt due to the consignor for the price of the goods is discharged, but no charge on the goods in favour of the consignor is thereby created" (e).

In *Ex parte Lambton, In re Lindsay* (f), a contract for the building of a ship provided that the purchase-money was to be paid by instalments, partly in cash and partly by means of bills of exchange, to be paid and given at specified stages of the progress of the construction, the balance being paid on completion by a bill. The ship was from the time of paying or giving the first instalment to be the absolute property of the purchaser to the extent of his advances, subject, nevertheless, to the builder's lien for any unpaid instalments. Any bills given during construction

(e) This case was considered in *Phelps*, 813.
Stokes & Co. v. Comber (1885), 29 Ch. D. (f) (1875), 10 Ch. 405.

were to be retired by the purchaser at completion and transfer. As the construction of the ship went on, the vendor drew bills upon the purchaser, which he accepted, for the instalments of purchase-money. After these bills had been negotiated, but before any of them became due, the purchaser took proceedings for liquidation, including his liability on the bills among his debts, and his creditors passed a resolution to accept a composition. The bill holders refused to accept the amount of composition when tendered. The purchaser shortly after the resolution gave notice to the vendor to rescind the contract. Not long after this the vendor became bankrupt, and the ship was completed by his trustee. The bill holders having claimed a lien on the ship, it was held, that the principle of *Ex parte Waring* was not applicable, and that the bill holders had no lien on the ship.

Lord Justice Mellish pointed out that there were various reasons why the rule in *Ex parte Waring* should not be applied to the case. One conclusive reason was that, at the time when the application was made, the acceptor of the bills had ceased to have any interest whatever in the ship, which was exclusively the property of the estate of the drawer; whereas the rule in *Ex parte Waring* only applies, either where the property of the acceptor has been pledged with the drawer, or the property of the drawer has been pledged with the acceptor, and not where the property is exclusively the property of one of the parties (*g*).

III. Bankruptcy Proceedings.—The rule will only apply if proceedings in the nature of bankruptcy have been taken against both customer and banker.

In *Ex parte General South American Co., In re Yglesias & Co. (h)*, M., a foreigner, drew a bill on Y., which was accepted, and remitted a bill of exchange to cover it. Before the acceptance became payable Y. filed a petition for liquidation, and the remittance came in specie to the hands of the receiver appointed in the liquidation. Shortly afterwards resolutions were duly registered for accepting a composition payable by instalments. M. was also

(*g*) See also *In re Barned's Banking Co., Ex parte Stephens* (1868), 3 Ch. 753; *Levi & Co.'s Case, In re New Zealand*

Banking Corporation (1869), 7 Eq. 449.
(*h*) (1875), 10 Ch. 635.

insolvent, and had, since making the remittance, entered into a composition with some of his creditors, but had not made any cession of his property, and remained liable to be sued on the bills. He was indebted to Y. on the account between them beyond 2,000*l*. It was held that as M., though unable to pay his debts, was liable to be sued, was free to deal with his property as he pleased, and was not subject to the jurisdiction of any Court, the doctrine of *Ex parte Waring* did not apply, and that the holder of Y.'s acceptance could not claim payment out of the remittance (i).

The principle established in *Ex parte Waring*, that securities held by a banker against his acceptances are available to the bill holders, if both acceptor and drawer are insolvent, does not apply where the acceptor or drawer is a joint stock company which has been ordered to be wound up, unless it be shown that the company is actually insolvent (k).

(i) Cf. *Powles v. Hargreaves* (1853), 3 De G. M. & G. 430; *Ex parte Dever*, *In re Suse* (No. 2) (1885), 14 Q. B. D. 611; and *sub nom. In re Suse and Sibeth*, *Ex parte Chartered Mercantile Bank of India*, 1 T. L. R. 248.

(k) *In re New Zealand Banking Cor-*

poration, Hickie & Co.'s Case (1867), 4 Eq. 226. In this case the view was expressed that the rule in *Ex parte Waring* does not apply where the acceptors are creditors of the drawers to an amount exceeding that due on the bills, at least if the acceptors have a general lien on securities deposited with them.

CHAPTER VIII.

THE BANKER AND THE HOLDER.

It has been seen that the banker is not liable to the holder of a cheque drawn by his customer, although the balance of the latter is sufficient to meet it (*a*). The cheque is not an assignment of so much of the debt due to the customer from the banker as is necessary to meet it, and the only liability of the banker, if he dishonours it, is to his customer.

The law is the same with regard to a bill of exchange accepted by a customer and made payable at his banker's (as distinguished from a bill of exchange accepted by the banker, upon which he is, of course, personally liable to the holder).

But the banker will render himself directly liable to the holder if he agrees with him, or communicates to him his intention, to hold assets of his customer for the purpose of meeting the bill.

Thus, if the holder and the acceptor together go to the banker of the latter, and it is agreed between the three that the banker shall hold money standing to the credit of the acceptor until the bill is satisfied, and if it is not satisfied that he shall pay it out of that money, the banker will be responsible to the holder (*b*). So if the acceptor sends money to the banker with instructions to pay it to the holder, and the banker afterwards expressly or impliedly authorizes a third person to tell the holder that he will so pay it (*c*).

In *Stevens v. Hill* (*d*), a customer of the defendant, who was a navy agent, signed a document in the following form :—

“Out of my half-pay, which will become due the first of January, pay to Stevens 15*l*.”

(*a*) At pp. 249, 327, *supra*.

(*b*) Per Lord Abinger, C. B., in *Walker v. Rostron* (1842), 9 M. & W. 411.

(*c*) *Lilly v. Hays* (1836), 5 A. & E. 548.

(*d*) (1805), 5 Esp. 247.

This document being brought to Hill, he said he had no money of the drawer's then in his hands, but that he would pay the sum named out of the drawer's money when he received it. Hill subsequently received moneys of the drawer sufficient to meet it, though at the date of the action a balance was due to him from the drawer. Lord Ellenborough directed the jury that it was the defendant's duty to have reserved money for that bill instead of paying other subsequent drafts, and that accordingly he was not protected by subsequent payments. A verdict was given for the plaintiff.

So if the acceptor sends an order to the banker of one who is his debtor directing the banker as soon as he shall have funds belonging to the debtor to pay to the holder of the bill a certain sum, and the banker promises the holder to pay him according to the terms of the order (e); or if the banker receives the bill from the holder for the purpose of receiving payment for him, and afterwards money is brought to him by his customer, the acceptor, for the express purpose of taking up the bill, and the banker keeps the money but does not deliver up the bill, he will be liable to the holder (f).

In *Noble v. National Discount Co.* (g) Wienholt & Co., being indebted to the plaintiffs and unable to pay them, agreed with the defendants that they should discount bills to be drawn by Wienholt & Co. and accepted by the plaintiffs for 2,500*l.* The plaintiffs handed the acceptances to the defendants. The defendants' manager asked the plaintiffs when they required the money. The plaintiffs said they did not want the money until the next day, but afterwards said they would take 2,000*l.* that evening. The manager said he would not hand the cheque for that amount to the plaintiffs, but would give it to Wienholt & Co.'s clerk, and that he should require their order for payment of the balance. Wienholt & Co.'s clerk got the cheque for 2,000*l.*, and handed it to the plaintiffs, and the plaintiffs on the same evening handed to the defendants an order by

(e) *Hodgson v. Anderson* (1825), 3 B. & C. 842; 5 D. & R. 735.

(f) *De Bernales v. Fuller* (1816), 14 East, 590, in a note to *Williams v. Everett*, explained in *Warwick v. Rogers*

(1843), 5 M. & G. 340, and approved in *Prince v. Oriental Bank Corporation* (1878), 3 A. C. 325, at p. 334.

(g) (1860), 5 H. & N. 225.

Wienholt & Co. for payment of the balance to the plaintiffs, and asked if that was all the defendants wanted. The manager said it was correct. On the following morning the plaintiffs demanded the balance, but Wienholt & Co., having in the meantime stopped payment, and the defendants having in their hands a large amount of bills which they had discounted for them, refused to pay the balance to the plaintiffs. The plaintiffs took up the bills at maturity. The jury having found a verdict for the plaintiffs, a rule to enter a verdict for the defendants was refused, the judges giving their reasons as follows:—

Chief Baron Pollock: "There will be no rule. It is clear that there was evidence of the defendants' liability; and the matter was left to the jury, who found for the plaintiffs. Indeed, I think we should have been bound to set aside the verdict if it had been the other way. Having presented the order, the plaintiffs, instead of receiving the money, said they would call another time. The defendants' assent amounts to saying, 'Call again and we will pay you.' After that, they were bound to retain in their hands so much money as the order dealt with, for the use of the plaintiffs."

Martin, B.: "I am of the same opinion. The present case appears to me to be decided by the authority of *Lilly v. Hays* (*h*) and *Walker v. Rostron* (*i*). In *Liversidge v. Broadbent* (*k*) we were all anxious to decide the case in favour of the plaintiffs, but it did not reach the line."

Bramwell, B.: "I concur with the rest of the Court. There is no doubt as to the law, that if one person is indebted to another he cannot become under an obligation to a third party without the agreement of all three. The defendants being indebted to Wienholt & Co., with the assent of all parties, agreed to pay the plaintiffs. In cases like the present, it is necessary to show that there was a fresh arrangement between the three parties, for without it there is simply an equitable assignment of the debt. Was there any evidence of such arrangement? I thought at first not, and that the reason why the money was not paid was that the plaintiffs

(*h*) See note (*c*), p. 399, *supra*.

(*i*) See note (*b*), p. 399, *supra*.

(*k*) (1859), 4 H. & N. 603.

had no right to do more than call on the defendants to receive the order and get the money the next day. But in truth the money was payable on the day on which the order was lodged, and the plaintiffs, who were entitled to receive it, left it with the defendants. The question was one for the jury. They might have come to the conclusion that the evidence showed nothing more than lodging an order to pay, but they have not done so" (*l*).

But nothing short of an agreement on the part of the banker to hold funds to the use of the payee, communicated to the latter, will render the banker liable to him (*m*). The receipt of specific funds by bill or otherwise from his customer, with express directions to apply such funds in meeting a particular draft, will be insufficient for this purpose (*m*), even although the customer has himself communicated to the holder the instructions given to the banker, and the banker has also in guarded language, and avoiding an undertaking to pay, informed the payee of the instructions which he has received (*n*).

In *Brind v. Hampshire* (*o*) A., resident abroad, remitted a bill to B., his agent in England, drawn by A. and specially indorsed by him to C., with whom his children were at school, in payment of C.'s account for their board and education. B. got the bill accepted by the drawees, and sent a letter by post to C. stating that he had received a commission from A. to pay her some money on account of his children, and desired to be informed when and how it should be delivered. While the bill remained in B.'s hands, he received directions from A. to keep it and the proceeds in his hands, and to have a fair investigation into C.'s accounts, and after such investigation to pay her what might be due to her. No such investigation took place, and B. detained the bill. It was held that the property in the bill had not passed to C.

In *Morrell v. Wootten* (*p*), by an order in a suit, A. was ordered

(*l*) See also *Griffin v. Weatherby* (1868), L. R. 3 Q. B. 753; 37 L. J. Q. B. 280; 18 L. T. 881; 17 W. R. 8; 9 B. & S. 726.

(*m*) *Williams v. Everett* (1811), 14 East, 582; *Yates v. Bell* (1820), 3 B. & Ald. 643; *Stewart v. Fry* (1817), 7 Taunt. 339; *Wedlake v. Hurley* (1830),

1 C. & J. 83; *Malcolm v. Scott* (1850), 5 Exch. 601; *Moore v. Bushell* (1857), 27 L. J. Ex. 3. See also *Scott v. Porcher* (1817), 3 Mer. 652; *Ex parte Heywood* (1816), 2 Rose, 355.

(*n*) *Malcolm v. Scott*, see last note.

(*o*) (1836), 1 M. & W. 365.

(*p*) (1852), 16 Beav. 197.

to pay a sum to B. After A. had appealed, B.'s bankers induced B. to enforce the order and pay the amount to his account, the bankers undertaking to repay it if, on the appeal, B. should be ordered to repay it. The order was reversed, and B. directed his bankers to pay the amount to A., but the direction was not communicated to A. The bankers had said they were quite ready to pay the money to A., and B. had said, "There it is for you," viz., at the bankers'. B. became bankrupt. It was held that neither the agreement, nor the order, nor the statements so made gave to B. any claim upon the fund in the hands of the bankers (*q*).

Cancellation or Detention of Bill.—In *Warwick v. Rogers* (*r*) it was held that a banker into whose box at the clearing-house a bill had been placed, according to the usage prevalent there, was only bound to take due care of the bill, and, if he did not pay it, to return it uncanceled, unless it had been cancelled by mistake, and in that event to indicate the same by writing on the bill. In that case, the banker having examined the bill, and having funds of the acceptor's in his hands, had cancelled the acceptance by drawing lines across his name. Later in the day he was ordered by the acceptor, who found himself insolvent, not to pay the bill, and thereupon he wrote on the bill, "Cancelled by mistake—orders not to pay," according to the usage as to bills cancelled by mistake; and the bill was returned in that state to the holder's banker at the clearing-house before the settling hour. It was held that the former banker was not liable to the holder, as no promise could be inferred on his part to pay the amount of the bill or return it without having cancelled or destroyed the acceptance (*s*).

Similarly, the banker will not be liable where he has cancelled the signature of the maker of a promissory note and written "paid" on the note, and then, before the note has been sent back to the payee dishonoured, has added "Cancelled in error," even though the amount of the note has been transmitted by transfer drafts and entries in the bank's books from the branch where it was made payable to the branch where the payee handed the same in,

(*q*) See also *Phelps, Stokes & Co. v. Comber* (1885), 29 Ch. D. 813, and cases cited in the last chapter.

(*r*) (1843), 5 M. & G. 340.

(*s*) See further, as to this case, pp. 311, 316, *supra*.

such transfer and entries not having been communicated to the payee (*t*).

It accordingly seems that a banker who omits to return or defaces a bill is not, in all cases, under an obligation to pay the amount; but if he does so wrongfully he becomes liable to an action for damages, if the holder has sustained damage by his breach of duty (*u*).

Statement by Drawer as to Provision for Bill.—A representation by the drawer, that bills of exchange drawn upon L. will assuredly be paid, for that the drawer has previously remitted to L. funds to a much larger amount, in consequence of which representation B. purchases those bills from the drawer, does not amount to an equitable assignment by the drawer of the funds in the hands of L., nor to a specific appropriation out of those funds of the amount of each of those bills (*x*).

Where, therefore, such an assurance had been given, and the funds in the hands of L. were larger than the amounts of the bills drawn upon him, but the bankruptcy of the drawer took place before the bills were payable, L. was held to be justified in refusing to pay the particular bills, and in handing over the funds to the legally appointed receiver of the bankrupt's estate, who demanded them on behalf of the general creditors of the drawer (*x*).

"It seems to me," said Lord Selborne, "that the transaction is simply one of the most ordinary mercantile kind, and perfectly consistent with the ordinary course of dealing between the Liverpool Bank and the drawers of the bills, which, upon the whole of the correspondence and the evidence, plainly was not one of specific trust or appropriation of any particular funds. The transaction was really of this kind—a person asked to take a bill wants to know distinctly whether the person who has drawn it has made provision for its payment. The statement is, we have sent forward

(*t*) *Prince v. Oriental Bank Corporation* (1878), 3 A. C. 325; 47 L. J. P. C. 42; 38 L. T. 41; 26 W. R. 543.

(*u*) *Per curiam in Warwick v. Rogers*, see note (*r*), *supra*. Cf. *Jeune v. Ward*

(1818), 1 B. & Ald. 653; Bills of Exchange Act, s. 42.

(*x*) *Citizens' Bank of Louisiana v. First National Bank of New Orleans* (1873), L. R. 6 E. & I. A. 352; *Thomson v. Simpson* (1870), 5 Ch. 659.

to Liverpool funds of a much larger amount, which are intended to be used in the payment of these and other bills. My Lords, if that be a specific appropriation or an equitable assignment, it follows that every ordinary transaction in commerce, where any inquiry whatever is made, would come into the same category. If anyone draws a cheque and gives a cheque upon a bank, it is a fraud, in one sense (a very intelligible sense), to do that if he has no account there. If he is known to have an account there, it is very likely that no question will be asked. But suppose a question is asked, and he says, 'I have a sufficient balance to meet it,' is that an equitable assignment of the balance? If it is not, there is no evidence of assignment here."

CHAPTER IX.

PAYMENT BY THE BANKER.

THE banker is authorized by his customer (as a general rule) only to pay genuine drafts properly indorsed, and in such a way as to discharge the customer from further liability thereon.

Accordingly, if the banker has satisfied himself as to the form of the bill—its signature, the terms of the order, and its indorsement—it will remain for him to consider whether, at the time when it is presented, he can safely pay it to the person by whom it is presented.

Payment in Due Course.

The Bills of Exchange Act provides—

59.—(1.) A bill is discharged by payment in due course by or on behalf of the drawee or acceptor (a).

“Payment in due course” means payment (b) made at or after the maturity of the bill to the holder thereof in good faith and without notice that his title to the bill is defective (c).

When Bill is Payable.

Date when Due.—The Act provides—

10.—(1.) A bill is payable on demand :

- (a) Which is expressed to be payable on demand, or at sight, or on presentation ; or
- (b) In which no time for payment is expressed.

(a) If the acceptor, instead of paying the bill to discharge it, discounts it, the drawer will not be discharged and the acceptor may re-issue it: *Attenborough v. Mackenzie* (1856), 25 L. J.

Ex. 244. See also *Morley v. Cuiverwell* (1840), 7 M. & W. 174.

(b) See sects. 3 (1), 17 (2).

(c) See sect. 90.

(2.) Where a bill is accepted or indorsed when it is overdue, it shall, as regards the acceptor who so accepts, or any indorser who so indorses it, be deemed a bill payable on demand.

14. Where a bill is not payable on demand (*d*) the day on which it falls due is determined as follows:

(1.) Three days, called days of grace, are, in every case where the bill itself does not otherwise provide, added to the time of payment as fixed by the bill, and the bill is due and payable on the last day of grace: Provided that—

(a) When the last day of grace falls on Sunday, Christmas Day, Good Friday, or a day appointed by royal proclamation as a public fast or thanksgiving day, the bill is, except in the case hereinafter provided for, due and payable on the preceding business day;

(b) When the last day of grace is a bank holiday (other than Christmas Day or Good Friday) under the Bank Holidays Act, 1871, and Acts amending or extending it, or when the last day of grace is a Sunday and the second day of grace is a bank holiday, the bill is due and payable on the succeeding business day.

(2.) Where a bill is payable at a fixed period after date, after sight, or after the happening of a specified event, the time of payment is determined by excluding the day from which the time is to begin to run, and by including the day of payment.

(3.) Where a bill is payable at a fixed period after sight, the time begins to run from the date of the acceptance if the bill be accepted, and from the date of noting or protest if the bill be noted or protested for non-acceptance, or for non-delivery.

(4.) The term “month” in a bill means calendar month.

Business Days and Hours.—A bill is only payable on a business day and within business hours. Business days are dealt with in Part I. Chap. 8, and business hours at page 441.

An ineffectual presentment after banking hours will be no evidence of dishonour (*e*).

Usance.—A usance is the time fixed by custom, in the case of foreign bills, for payment as between the place where a bill is

(*d*) Cf. sects. 11, 12, 13.

(*e*) *Parker v. Gordon* (1806), 7 East, 385; sect. 45 (3), cited on the next page.

drawn and that in which it is payable. Bills are sometimes drawn payable at one or more usances (*f*).

The Holder.

2. "Holder" means the payee or indorsee of a bill or note who is in possession of it, or the bearer thereof.

45.—(3.) Presentment must be made by the holder or by some person authorized to receive payment on his behalf at a reasonable hour on a business day, at the proper place as hereinafter defined, either to the person designated by the bill as payer, or to some person authorized to pay or refuse payment on his behalf if with the exercise of reasonable diligence such person can there be found.

In the case of death, the executor or administrator (*g*); in the case of bankruptcy, the trustee (*h*); and in the case of an execution the sheriff (*i*), is entitled to receive payment of the bill.

The banker should not wait for a letter of advice before paying a bill, unless his customer has instructed him to do so (*k*).

Time for Inquiry.

On Presentment for Acceptance.—When a bill is presented for acceptance, the drawee is entitled to the customary period for deliberation as to whether he will accept it or not. This period appears, in the case of bankers and merchants, to be twenty-four hours (exclusive of non-business days), or until the close of business on a short day when the twenty-four hours would not expire until later on that day (*l*).

On Presentment for Payment.—In case of doubt as to the identity of the person presenting a bill for payment or as to its genuineness, the banker has, according to a dictum of Maule, J., a reasonable

(*f*) See Chalmers' Bills of Exchange, 6th ed. p. 37.

(*g*) Williams on Executors, 9th ed. p. 812.

(*h*) Bankruptcy Act, 1883, ss. 44, 49.

(*i*) 1 & 2 Vict. c. 110, s. 12.

(*k*) See *Arnold v. Cheque Bank* (1876),

1 C. P. D. 578, at p. 586.

(*l*) Bills of Exchange Act, s. 42; *Bank of Van Diemen's Land v. Victoria Bank* (1871), L. R. 3 P. C. 526, at pp. 542, 543, cited in Part V. Chap. 3; *Jeune v. Ward* (1818), 1 B. & Ad. 653, at p. 659; Chalmers' Bills of Exchange, 6th ed. pp. 141-42.

time in which to make inquiry. "It may possibly happen that the day" (on which the bill becomes due) "may not afford sufficient time for making reasonable inquiries, as when the bill is presented by a stranger, and the indorsements necessary to give him title are by persons unknown to the bankers. In such a case, I conceive the banker would be justified in refusing to pay till he had more information as to whether the presenter was holder or not. A refusal to deliver up goods to the owner, on the ground that the holder must have time to ascertain whether he is the owner, is no conversion. It has been held that a banker, who was in funds when an acceptance of his customer was presented, was by law entitled, if the funds had been recently paid in, to a reasonable time to inquire whether the funds were adequate to answer the order. A customer whose acceptance had been dishonoured under such circumstances failed in his action" (*m*).

Mr. Chalmers, however, regards this as very questionable, pointing out that the usual practice is to offer to pay under an indemnity (*n*).

The holder will have no right of action upon the bill until the expiration of the last day of grace; though, if payment is refused at any time on that day, he is entitled at once to give notice of dishonour to the drawer and the indorsers (*o*).

When Payment is Complete.

The question when a payment is complete and irrevocable as between the banker and the person presenting a bill over the counter, and as between two bankers, is considered in Part III. Chap. 10 (*p*).

(*m*) *Roberts v. Tucker* (1851), 16 Q. B. 560, at p. 578. See, however, per Lord Macnaghten in *Bank of England v. Vagliano Brothers*, [1891] A. C. 107, at p. 157.

(*n*) Bills of Exchange, 6th ed. p. 206.

(*o*) *Kennedy v. Thomas*, [1894] 2 Q. B. 759.

(*p*) In *Pedder v. Watt* (1796), 2 Chitt. 619, a debtor directed his bankers to place to the credit of his creditor, who was in debt to the bankers, a sum of money "so as to make the payment the

same as a bill at one month from this date." The bankers treated this order as if a bill for its amount had been sent at one month. Before the expiration of the month the bankers stopped payment and shortly after became bankrupts. It was held that there had been no payment, and consequently that the debtor was not discharged. See also *Brown v. Kewley* (1801), 2 B. & P. 518; and cf. *Smith v. Ferrand* (1827), 7 B. & C. 19; 9 D. & R. 803.

Capacity in which Payment Made.

Pollard v. Ogden (g) was an action by customers of a bank against the bankers, to try their right to debit them with a bill. It appeared that the plaintiffs were drawers of the bill, which was accepted, payable at the bank. The plaintiffs discounted the bill with the bank and indorsed it to them; they re-discounted the bill and indorsed it to the re-discounter. On the maturity of the bill it was presented by the holder at the bank along with several other bills payable there, all of which bore the bank's indorsement. The bank paid the amount of the whole without any indication of whether they paid as indorsers or as agents for the acceptors. The account of the acceptor of this bill was at the time overdrawn; he stopped payment on that day; and, on the next, notice of dishonour was given by the bank to the plaintiffs, and they were debited with the amount. It was left to the jury to say, whether the bank paid the bill on their own account as indorsers, or as agents of the acceptor. The jury found that they paid as indorsers; and the bank had a verdict. It was held that the question was properly left; that the bank had a right to pay the bill as indorsers, reserving to themselves time to inquire whether they would honour the bill or not; that it was a question of fact whether they intended to do so; and that there was no obligation on them to inform the holders in what capacity they paid.

"I think," said Mr. Justice Erle, "it is clear law that the holder of a bill indorsed to him by a bank at which the acceptor has made it payable may, if the bank choose to dishonour the bill, receive payment forthwith from the bankers in their capacity of indorsers; and it seems not disputed that, if the defendants' bank in this case had expressly said to the holder that they had no effects of the acceptor, but paid as indorsers, they would have been entitled to charge the plaintiffs with the amount. They did not say this; but it is clear to my mind that they meant to reserve to themselves the right to examine into the state of the accounts and determine whether they would honour the bill or not. The defendants' bank might have said to the holder: 'we require a

reasonable time to examine into the state of the accounts between us and the acceptor before we either honour or dishonour this bill; but in case we determine to dishonour it we shall be liable to you as indorsers; therefore, to save trouble, take your money; if we honour the bill you are paid; if not, we have taken it up as indorsers of a dishonoured bill.' Now, if this had been said, there would have been no case for the plaintiffs; and I have been able to discover no reason why, if such was the intention of the bankers, any expression of this sort to the holder should be required. I have listened attentively, that it might be pointed out to me that there was some possible state of things in which it might be material to the holder to know in which capacity the bankers paid him; but no such state of things has been suggested" (r).

Recovery from Person Paid.

Where a banker has paid money in reliance upon a forgery to a person who has requested the payment in bad faith, the banker can recover from the latter what he has paid him (s).

Where the person who has received the payment has acted in good faith and the banker has not given notice of the mistake until after the position of the former has been altered, as, for example, if, being an agent for collection, he has paid over the money to his principal, or if it is too late for him to give an effective notice of dishonour, the banker cannot recover (t).

In the case of a bill of exchange, if the mistake be discovered immediately after the payment; the money could probably be recovered. But if the money has been received in good faith and an interval of time has elapsed, although no legal right of the holder has meanwhile been compromised, apparently the money cannot be recovered (u).

(r) Cf. *Boyd v. Emmerson* (1834), 2 A. & E. 184, cited at p. 421, *infra*.

(s) *Martin v. Morgan* (1819), 3 Moo. C. P. 635; 1 B. & B. 289; *Kendal v. Wood* (1871), L. R. 6 Ex. 243.

(t) *Smith v. Mercer* (1815), 6 Taunt. 76; 1 Marsh. 453; explained in *Wilkinson v. Johnson* (1824), 3 B. & C. 428.

Cf. *Deutsche Bank v. Beriro* (1895), 1 Com. Cas. 255.

(u) *Smith v. Mercer*, see last note; *Cocks v. Masterman* (1829), 9 B. & C. 902; *London and River Plate Bank v. Bank of Liverpool*, [1896] 1 Q. B. 7; per Bramwell, B., in *Hart v. Frontino*, &c. Co. (1870), L. R. 5 Ex. 111, at

But this rule only applies to negotiable instruments, on the dishonour of which notice has to be given to some drawer or indorser, who would be discharged from liability unless such notice were given in proper time (x).

In any other case, provided the holder has not been induced by the negligence of the party paying to give credit for the amount of the draft, and notice of the mistake is given in reasonable time, and no loss has been occasioned by delay in giving it, the person who has paid money under a mistake of fact may recover it (x).

Accordingly, where a cheque for \$5, certified by a bank's stamp, according to the practice prevalent in Canada and the United States of America, was fraudulently altered to \$500 and paid by the certifying bank to a holder for value, the mistake not being discovered until the following day, it was held that the bank could recover \$495 from the holder. It was pointed out by the Judicial Committee that the cheque as drawn and certified had not been dishonoured, and that accordingly notice of dishonour was not necessary (x).

So, in *Continental Caoutchouc and Gutta Percha Co. v. Kleinwort, Sons & Co.* (y), it was held that, where money is paid by mistake by a debtor in supposed accordance with a direction as to an assignment of his debt, and the receiver has not been induced to alter his position by reason of the mistaken payment, the money can be recovered. The mere fact that the accounts as between the receiver and the assignor have changed in the ordinary course of business before the discovery of the mistake is immaterial.

Where the banker has been negligent in making the payment, apparently this will affect his right to recover only if the person receiving the payment has been prejudiced thereby (z).

In *Rogers v. Kelly* (a) the plaintiff, having indorsed a bill

p. 115; per Lindley, J., in *Sim v. Anglo-American, &c. Co.* (1879), 5 Q. B. D. 188, at p. 196; per Vaughan Williams, L. J., in *Sheffield Corporation v. Barclay*, [1903] 2 K. B. 580, at p. 590.

(x) *Imperial Bank of Canada v. Bank of Hamilton*, [1903] A. C. 49.

(y) (1904), 20 T. L. R. 403.

(z) See *Imperial Bank of Canada v. Bank of Hamilton*, [1903] A. C. 49, at p. 56. Cf. also *Price v. Neal* (1762), 3 Burr. 1355; *Mather v. Maidstone* (1856), 18 C. B. 273; *Kelly v. Solari* (1841), 9 M. & W. 54; *National Bank of North America v. Bangs* (1871), 8 Am. R. 349.

(a) (1809), 2 Camp. 123.

drawn by one L. C. for 130*l.*, payable at Messrs. Austins & Co.'s, and finding that it would not be honoured by the acceptor, paid in this sum of money to the bankers for the purpose of retiring it. The defendant held another bill of exchange for the same sum, accepted by the same person, due the same day, and payable at the same place. The latter bill being presented for payment first, and no funds being provided to pay it, the bankers' clerk, by mistake, gave the defendant the 130*l.* paid in by the plaintiff to satisfy the bill to which he had put his name. The plaintiff sued to recover the 130*l.* Lord Ellenborough said: "There is no privity between the parties to this suit. The plaintiff's claim is on the bankers, and they must seek their remedy against the defendant the best way they can. The plaintiff's money must still be considered as in the hands of the bankers. His account with them is the same as if this mistake had not been committed." The plaintiff was accordingly nonsuited.

As to the position of a banker collecting a crossed cheque, see Part V. Chap. 9.

Where a bill has been accepted under a mistake of fact and paid, the payment may be recovered back (*b*).

In connection with the subject of this chapter generally, reference may be made to Part III. Chap. 10.

(*b*) *Kendal v. Wood* (1871), L. R. 6 Ex. 243.

CHAPTER X.

DISHONOUR BY BANKER.

It has been seen in Chapter 1 of this Part that the banker's obligation to his customer to honour bills is dependent upon his agreement, express or implied, to do so.

Where the obligation exists, the banker will only be bound to pay, or accept, as the case may be, a bill presented during banking hours on a business day (*a*), and provided, at the time of presentation, the balance upon his customer's account is adequate (*b*). Upon the latter point reference may be made to Chapter 7 of Part II.

Where the banker, being under an obligation to his customer to accept or pay a bill, nevertheless dishonours it, he will be liable for such damages as naturally and reasonably result therefrom (*c*).

In *Larios v. Bonany y Gurety* (*d*) a Gibraltar firm entered into a contract with A., of Algeciras in Spain, in consideration of certain property having been transferred to them, to open a credit in his favour to the extent of \$9,400, and to honour his drafts to that amount. After advancing him some sums of money they refused to accept a bill for \$1,000 drawn upon them by him, and subsequently refused to make any further advances. It was held that A. was entitled to general and substantial damages.

In *Armfield v. London and Westminster Bank* (*e*) the plaintiff sued the defendants for wrongfully refusing to pay a bill of

(*a*) See p. 306, *supra*.

(*b*) *Whitaker v. Bank of England* (1835), 1 C. M. & R. 744. See also *Parker v. Gordon* (1806), 7 East, 385; *Elford v. Teed* (1813), 1 M. & S. 28.

(*c*) *Prehn v. Royal Bank of Liverpool* (1870), L. R. 5 Ex. 92. See also *Bell v. Carey* (1849), 8 C. B. 887; pp. 326, 327, *supra*, and Part VI. Chap. 4.

(*d*) (1873), L. R. 5 P. C. 346.

(*e*) (1883), 1 Cab. & E. 170.

exchange accepted by him payable at their bank. The defence was that the bank had not sufficient funds in hand to meet the bill without crediting the plaintiff with the proceeds of cheques paid in to his account upon the day the bill became due. The bill which was dishonoured was not an ordinary trade bill.

Cave, J., left it to the jury to say whether it was the course of business between the plaintiff and defendants that cheques before clearance would be treated as cash; and also told them that if they found for the plaintiff they must, in assessing the damage, take into consideration the fact that the bill in question was not an ordinary trade bill, so that there was not the same likelihood of injury to the plaintiff's credit (*f*).

As to the subject of the banker's liability for dishonour, reference may be made to pp. 326, 327, and to Part VI. Chap. 4.

(*f*) See further, as to this case, p. 146, *supra*.

Part V.

COLLECTION.

CHAPTER I.

SCOPE OF THE BANKER'S RESPONSIBILITY.

Duty to Customer.

As his customer's agent in the matter, the banker is bound to use reasonable skill, care, and diligence in presenting and securing payment of the drafts entrusted to him for collection and placing the proceeds to his customer's account, or in taking such other steps as may be proper to secure the customer's interests.

His duty in any particular instance will depend upon all the facts of the case and the usages of business with regard thereto.

Thus, if he is employed to obtain the acceptance of a bill, he may be justified by considerations of prudence and the interest of his customer in not pressing for acceptance in such a way as to lead to a refusal, providing he takes the proper steps at the right time to preserve his customer's rights (*a*).

If he is dilatory in endeavouring to procure acceptance or payment, or in giving notice of dishonour, or is otherwise negligent in the matter, and his customer suffers damage in consequence, he will be liable to make it good (*b*).

(*a*) *Bank of Van Diemen's Land v. Bank of Victoria* (1871), L. R. 3 P. C. 526.

(*b*) Per Sir Montague Smith, delivering the judgment of the Judicial Committee in *Prince v. Oriental Bank Corporation*

Position as regards the Drawee.

The collecting banker is under no special duty, as such, to protect the interests of the person to whom he presents a draft for acceptance or payment. So long as he does not give any personal undertaking or make any misrepresentation, he incurs no responsibility to him.

Thus, in the case of a documentary bill, if the banker states that he holds the bill of lading, he does not thereby warrant the genuineness of the document in his hands purporting to be the bill of lading.

In *Leather v. Simpson* (c) a bill of exchange drawn upon the plaintiff by his correspondent abroad against bill of lading was sent through the defendants, who were bankers, for presentation and collection. The bank presented the bill to the plaintiff with this memorandum: "The bank holds bill of lading and policy for 251 bales of cotton, per William Cummings." The plaintiff accepted the bill without asking to see the bill of lading, and afterwards retired it before it was due, paid the money, and received the bill of lading, which proved to be a forgery. Upon bill filed against the bank to recover back the money so paid upon the bill of exchange, it was held that the memorandum did not amount to a guarantee by the bank that the so-called bill of lading was genuine, and that the plaintiff had no equity to recover back the money.

"So far from the Union Bank misleading Beach," said Vice-Chancellor Malins, "I am of opinion that Beach could only have understood it in one way—that Shute had transmitted a bill of lading, and the bank had that bill of lading, which would be forwarded for inspection if required. If the bill was accepted, then the bill of lading would be handed over when the bill arrived at maturity, and when the acceptor was called on to pay it. Therefore, I think to say that there was any misleading by the Union

(1878), 3 A. C. 325, at p. 331; *Van Wart v. Woolley* (1824), 3 B. & C. 439; *Lubbock v. Tribe* (1838), 3 M. & W. 607, at p. 612; *Union Bank of Spain and England v. Levison* (1887), 4 T. L. R.

13. Cf. *Deverill v. Burnell* (1873), 8 C. P. 475. See also Chap. 8 of this Part.

(c) (1871), 11 Eq. 398.

Bank is attempting to carry the case far beyond anything that the facts warrant."

Liability for Conversion.

In collecting upon his customer's instructions, a banker, in common with the rest of the community under all circumstances, is legally bound to refrain from converting property belonging to another.

In this connection he cannot secure immunity from liability by exercising the utmost care and skill. His responsibility is absolute, except in so far as it is qualified by statute in the case of the collection of crossed cheques for a customer.

The banker's duty to his customer as collecting agent is treated in Chapters 2 to 8, and his liability for conversion in Chapter 9 of this Part.

CHAPTER II.

PRESENTMENT OF CHEQUES.

A BANKER to whom a cheque is delivered for collection is under an obligation to his customer to use all reasonable diligence in presenting it for payment. If loss is sustained by the customer in consequence of his banker's omission to use such diligence, the latter will be liable in respect thereof.

It is clear that, in the absence of some special reason to the contrary, a banker will be bound to present the cheque within the time allowed by law as between the customer and the drawer or any indorser. But his duty as agent may require him to present it more speedily. Accordingly, although the time which is reasonable as between the payee and the drawer is in general a sufficient guide to the obligation of the banker, it does not necessarily determine it. What is reasonable on the part of the banker as his customer's agent must, in the last resort, be a question of fact (*a*).

In this connection reference may be made to pages 265—267.

The general rule as to the position of the banker with regard to the presentment of cheques was laid down in *Lubbock v. Tribe* (*b*), where Lord Abinger, C. B., said: "It appeared that the defendant was indebted to the Kellewerris Company for certain shares, and when they threatened to bring an action against him for the amount, he said, 'I have paid it (by cheque or note of hand) to your agents,' the plaintiffs. If he did so, and they afterwards refused or neglected to present the cheque at the proper time, and lost it, they are accountable to the Kellewerris Company, and he is not accountable to them: when they failed to present the cheque

(*a*) See *Wheeler v. Young* (1897), 13 T. L. R. 468.

(*b*) (1838), 3 M. & W. 607, at p. 612. Cf. *Deverill v. Burnell* (1873), L. R. 8 C. P. 475.

in due time, they made it their own, and they are bound to pay the company, and cannot recover from the defendant" (c).

Drawee as Collecting Banker.

Where a banker receives a draft which is drawn upon himself by one customer in favour of another, it is important to distinguish the precise functions which he discharges in relation to it.

In *Kilsby v. Williams* (d) it appeared that the defendants were the bankers both of the plaintiff and of one Robertson, and that on the 13th November, 1821, the plaintiff paid in at the defendants' counter a cheque of Robertson on them for 250*l*. The cheque was received by their clerk without anything being said or any entry made. In the course of the day Robertson paid in bills for 1,600*l*., the produce of which he expressly appropriated to the charges of the day. This produce, after deducting the discount, amounted to 1,579*l*.: the charges consisted of bills accepted by Robertson to the amount of 1,342*l*. These were paid, and on the same day two cheques of Robertson, for 50*l*. each, were also paid. On the 14th of November the defendants wrote a letter to the plaintiff stating that the 250*l*. cheque was not paid, and that they would keep it in the hope of there being money to pay it, and they promised Robertson also to pay it when they had funds. On the 14th Robertson paid in different sums of money, part of which was by him specifically appropriated to certain payments, leaving, however, an unappropriated balance of 93*l*. On the 15th November Robertson became bankrupt. During all these transactions the defendants were in advance themselves to Robertson upwards of 9,000*l*. Lord Chief Justice Abbott left it to the jury to say whether the cheque for 250*l*. was presented on the 13th, before the two cheques for 50*l*. each, which the jury found in the affirmative; and he directed them, in that case, to find for the plaintiff, on the ground that on the 14th November they had, exclusively of their own account, a balance of more than 250*l*. due to Robertson in their hands, and that, under the circumstances, they had no right to appropriate that balance in reduction of their own account.

(c) Cf. *Hare v. Henty*, cited at p. 426, chapter generally.
infra, and the cases cited in this (d) (1822), 5 B. & Ald. 815.

The jury accordingly found a verdict for the plaintiff, damages 250*l*. A rule for a new trial was refused.

The Lord Chief Justice, in the course of his judgment, said : "If the balance, instead of being 237*l*., had exceeded 250*l*., I should have had no doubt that the defendants were bound to appropriate it to the payment of the plaintiff; for when they received the cheque from him, they became his agents to receive the money upon it as early as possible, and if they could be allowed to appropriate the money received by them to the payment of subsequent cheques, it would be doing great injustice and injury to their own customer. But I doubted at the trial whether they would be bound to pay the cheque in part. On the 14th of November, however, a letter is written by them, in which they state that the cheque was not paid, and that they would keep it in the hope of there being money to pay it. In the course of that day money was paid in, part of which was specifically appropriated, leaving a balance unappropriated of 93*l*. This sum being added to 237*l*. exceeds the amount of the cheque in question; and I think that, under these circumstances, the defendants were liable to pay it, in preference both to the two of 50*l*. each, and to their own balance. I am, therefore, of opinion that the verdict is right."

Mr. Justice Bayley further said : "If the defendants had not been the plaintiff's bankers, he would have immediately demanded the money due upon the cheque, and then they must have either paid him, or if they had refused payment, he might have had immediate recourse to Robertson. In either case he would have had the advantage of the priority of his presentment over the holders of the two cheques for 50*l*. each. Now he ought not to be placed in a worse situation because he was a customer of the defendants."

In *Boyd v. Emmerson* (e) the plaintiff, receiving a cheque drawn upon the defendants, who were his own bankers, took the cheque to their banking-house, where he first gave some directions to a clerk upon another subject; and then, while the clerk was minuting such directions, laid the cheque on the counter, and said, "Place this to my account," or "credit." Nothing more was said on

(e) (1834), 2 A. & E. 184.

either side, and the plaintiff left the cheque. The account of the drawer was overdrawn. At the time the managing partner was absent. On his return upon the same day he directed a clerk to go on the following morning to the residence of the drawer, a few miles distant, to ascertain whether he had paid in any money to the account of the bank, as he sometimes did, at their correspondents' in London. The clerk went on the following day, but could not find the drawer. In the evening of that day the bankers gave notice to the plaintiff that the cheque could not be paid. It had not been cancelled or placed to the plaintiff's credit or debited to the drawer. It was held that, in the absence of any express direction or demand by the plaintiff at the time of presenting the cheque, the bankers were entitled to consider it presented to them, not as the agents of the drawer for the purpose of present payment, but as the plaintiff's agents, to place it to his credit, like any other negotiable security, and obtain payment with reasonable diligence; and, consequently, that no implied promise to pay arose from the cheque being received without observation, and no further communication made to the plaintiff till the following day, and also that timely notice had been given.

In giving judgment, Lord Denman, C. J., said: "I think the statements in the declaration, that in consideration of the cheque being delivered up to the defendants, they promised to pay the amount, or to allow the plaintiff credit for it, are not proved. If they did so promise, undoubtedly they became holders to his immediate use; but I think that what passed at the time of the presentment was, at the very least, equivocal. The plaintiff came with the cheque to the banking-house, and gave directions to Reader to provide for a bill coming due the following month. While Reader was writing down the particulars of that request, the plaintiff laid the cheque upon the counter, saying, 'Place this to my account.' No intimation was given to him that the request would or would not be complied with; or that Matson had overdrawn his account. If, in delivering the cheque, he had said at once, 'Cash me this cheque,' or 'Give me credit for it,' he must have drawn from Reader a distinct answer; but by merely saying, 'Place it to my account,' he leaves it upon the usual terms, and subject to the contingencies to which bills or cheques so paid in

are liable; and if he received notice of dishonour in proper time, it was sufficient. He did receive it on Tuesday, the 20th of November, on which day it was ascertained that the cheque could not be paid: I think it would have been sufficient if he had received it on the Wednesday. It has been held, that the relation of customer and banker makes no difference in the rule as to notice of dishonour" (*f*). His Lordship then referred to *Kilsby v. Williams* (*g*), and concluded: "In the present case, I think the plaintiff, when he presented the cheque, should have given distinct notice whether he presented it as a cheque to be paid, or to be merely placed to his account like other securities. In the absence of such statement by him, I draw the inference that the cheque was received in the latter character; and I therefore think the defendants are entitled to our judgment."

Presentment through Clearing-house.

Where a draft is made payable at a banker's in a town where there is a clearing-house, presentment through that medium is deemed to be a presentment at the bank (*h*).

Payment through the clearing-house is discussed at pp. 310—319.

Time for Presentment.

The Bills of Exchange Act provides—

74. Subject to the provisions of this Act (*i*)—

(1.) Where a cheque is not presented for payment within a reasonable time of its issue, and the drawer or the person on whose account it is drawn had the right at the time of such presentment as between him and the banker to have the cheque paid, and suffers actual damage through the delay, he is discharged to the extent of such damage, that is to say, to the extent to which such drawer or person is a creditor of such banker to a larger amount than he would have been had such cheque been paid.

(2.) In determining what is a reasonable time regard shall

(*f*) See *Crosse v. Smith* (1813), 1 M. & S. 545.

(*h*) *Reynolds v. Chettle* (1811), 2 Camp. 596; *Harris v. Packer* (1833), 3 Tyr. 370.

(*g*) See p. 420, *supra*.

(*i*) See sect. 46.

be had to the nature of the instrument, the usage of trade and of bankers, and the facts of the particular case.

- (3.) The holder of such cheque as to which such drawer or person is discharged shall be a creditor, in lieu of such drawer or person, of such banker to the extent of such discharge, and entitled to recover the amount from him.

In computing the time allowed for presentment of a cheque, non-business days (*k*) must be excluded (*l*).

Whether or not a cheque has been presented within a reasonable time of its issue is a question for the jury (*m*).

An indorser will be discharged from liability on a cheque if it is not presented for payment within a reasonable time after indorsement (*n*).

Mr. Chalmers says that the result of the cases appears to be this: "A party who receives a cheque has a clear day for presenting or forwarding it. If instead of presenting it himself, he forwards it to someone else to present, the question is, was he acting reasonably in so doing?" (*o*).

In considering the cases decided before the Bills of Exchange Act it must be borne in mind that it is possible that the words of the section above quoted may have rendered the law somewhat more elastic.

In *Alexander v. Burchfield* (*p*) it was laid down that the holder of a cheque, who is in the same place as the banker upon whom it is drawn, is, in general, bound to present it for payment not later than the day following that on which he receives it, whether the presentment is made by himself or through his banker, but that the time for presentment may be extended by the assent of the drawer, express or implied.

In *Rickford v. Ridge* (*q*) it was held that a banker in London, who receives a cheque by the general post, is not bound to present it for payment till the following day.

(*k*) As to these, see p. 101, *supra*.

(*l*) Sect. 92. See p. 102, *supra*.

(*m*) *Wheeler v. Young* (1897), 13 T. L. R. 468.

(*n*) Bills of Exchange Act, s. 45.

(*o*) Chalmers' Bills of Exchange, 6th ed. p. 252.

(*p*) (1842), 7 M. & G. 1061.

(*q*) (1810), 2 Camp. 537.

In *Boddington v. Schlenker* (r) a debtor had paid his creditor by a crossed cheque, and the latter on the same day transmitted it to his banker. The banker did not present it at the clearing-house in time for that day, when it would have been paid, and on the next it was dishonoured, the firm on which it was drawn having stopped payment. It was held that, even if, where the holder of a crossed cheque delivers it to his banker on the day he receives it, within a convenient time before the clearing hours, the banker is liable as between him and his customer for neglecting the usual practice, to present it at the clearing-house the same day, as he would be for disobedience of a special direction to present it for payment on that day, such omission of the banker did not discharge the drawer of the cheque: the holder of the cheque being within time if he presents it at any time during banking hours the day after he receives it.

Meaning of "London Cheque."—In *Forman v. Bank of England* (s) the plaintiff, a customer of the Law Courts Branch of the defendant bank, paid into his account before 3 p.m. on May 21st a cheque in the following form: "Norwich Union Life Insurance Society. No. 889. Norwich, May 20, 1901. Barclay & Company (Ltd.), with which has been incorporated Gurneys, Birkbecks, Barclay and Buxton, Bank Plain, Norwich, or head office, 54, Lombard Street, London. Pay to Thomas W. Forman—or order, five hundred pounds." At the time this cheque was paid in the plaintiff had a balance standing to his credit of 103*l.* 6*s.* 10*d.* It is a rule of the defendant bank that, if cheques drawn on city banks are paid in before 3 p.m. they can be drawn against the next day. On May 22nd the plaintiff drew a cheque upon the defendant bank for 239*l.* in favour of a third person, which was presented on May 23rd and dishonoured, owing to the fact that the defendants had treated the Norwich Union cheque as being payable at Norwich, and had, accordingly, presented it through the country clearing-house, in consequence of which the amount was not collected by the time the cheque for 239*l.* was presented. In an action for dishonouring the cheque expert witnesses from various

(r) (1833), 4 B. & Ad. 752, cited at pp. 310, 311, *supra*.

(s) (1902), 18 T. L. R. 339.

banks expressed the opinion that the cheque paid in was a London and not a country cheque, and stated that there was a general custom that cheques in this form should be treated as London cheques.

Lord Alverstone, C. J., left the following questions to the jury: (1) Was the cheque a cheque on a city bank? (2) Is there a recognised and general custom amongst London bankers that cheques in this form should be treated as London cheques? The jury answered both questions in the affirmative and assessed the damages at 75*l.*, for which judgment was given.

Country Banker.—In *Hare v. Henty* (*t*) it was held that a country banker receiving from a customer a cheque for presentment drawn upon another country banker not resident in the same town, is not bound to transmit it for presentment by the post of the day on which he receives it, but has until post time of the next day for so doing. The agent to whom it is forwarded similarly need not present it until the day after he receives it. These rules apply not only as between the parties to the cheque, but also as between banker and customer, unless circumstances exist from which a contract or duty on the part of the banker to present earlier, or to defer presentment to a later period, can be inferred.

The country banker is justified in sending the cheque delivered to him for collection to London, to be presented to the agent of the drawee bank and cleared in the usual way (*u*).

In *Moule v. Brown* (*x*) a cheque drawn by F. on a banker at Bath was cashed for the defendant by a branch of the North Wilts Bank at Malmesbury, on Tuesday, March 28th. The same day it was forwarded to the principal North Wilts Bank at Melksham, twelve miles from Bath; on Friday, the 31st, it was presented at Bath and dishonoured. It was held that the presentment was not in time to give the North Wilts Bank any claim against the defendant.

(*t*) (1861), 10 C. B. N. S. 65.

(*u*) *Wilts and Dorset Bank v. Cook*
(1889), 5 T. L. R. 703; 53 J. P. 791.

See also *Prideaux v. Criddle*, cited at
p. 429, *infra*.

(*x*) (1838), 4 Bing. N. C. 266.

“The result of the cases, from *Rickford v. Ridge* to *Boddington v. Schlenker*” (y), said Tindal, C. J., “is, that the party receiving a cheque has till the following day to present it, where there are the ordinary means of doing so. Here, the plaintiffs resided in a post town, and if they had transmitted the cheque to Bath by the next day’s post, it would have been presented on Thursday. If there was any sufficient reason for not pursuing that course, it lies on them to show it; but I think upon this state of the facts they have been guilty of laches.”

In *Bailey v. Bodenham* (z) the facts were as follows: On Wednesday, May 6th, A. received, at Monmouth, a cheque drawn upon M. & Co., bankers at Ross, about ten miles distant. On Friday, the 8th, he paid it in to his bankers’ at Monmouth, and they on the same day sent it by post to their London agents (the City Bank), to be passed through the country clearing-house there. The drawees’ London agents were B. & Co. (whose names appeared in a printed memorandum at the foot of the cheque), but their account with them was closed on Thursday, the 7th. The cheque being refused by B. & Co. at the clearing-house, the City Bank sent it by post on Saturday, the 9th, for payment to the drawees, who kept it until Friday, the 15th, and then returned it to the City Bank, who received it on Saturday, the 16th, and sent it by that day’s post to their correspondents, the Monmouth Bank, who (receiving it on Sunday, the 17th) sent notice of the dishonour by the post on Tuesday, the 19th, to the drawer, whom it reached on the 20th. A run upon the bank of M. & Co. commenced on Monday, the 11th, and on Wednesday, the 13th, at noon, they finally stopped payment. In an action in the County Court by the Monmouth Bank against the drawer, it was proved that the drawees sent cash through the post to country bankers, in payment of cheques drawn upon them, as late as Monday, the 11th, but did not honour any cheques forwarded to them by London bankers after Thursday, the 7th; that, if the cheque in question had been received by them by post from the City Bank on Friday, the 8th, it would not have been paid; but that, if presented across the counter

(y) See pp. 424, 425, *supra*.

(z) (1864), 16 C. B. N. S. 288; 33

L. J. C. P. 252; 10 Jur. N. S. 821; 10

L. T. 422; 12 W. R. 865.

at any time before the final stoppage on Wednesday, the 13th, it would have been paid.

The County Court judge having upon these facts non-suited the plaintiffs, upon appeal the Court affirmed his decision; holding that the presentment was not in due time. They also held that the mention of the names and address of the London agents in a memorandum at the foot of a country banker's cheque did not make the cheque payable at the place so indicated.

Chief Justice Erle was rather inclined to think that sending the cheque by post was a good presentment, whereby the City Bank constituted the drawees their agents to present to themselves. The other judges did not express any opinion upon the point, though Byles, J., observed that evidence of usage in a particular case might, no doubt, make such a mode of presentment good (*a*).

Foreign Cheques.—In *Heywood v. Pickering* (*b*) A., in London, drew a cheque on B. & Co., bankers at Jersey, in favour of C. on the 27th of January, and C. handed it to a London bank on the 28th, who, having no agent at Jersey, the same day sent the cheque by post direct to B. & Co. demanding payment. The cheque in due course of post would have arrived at Jersey on the 29th. B. & Co. stopped payment on the 4th of February, and on the 7th of February returned the cheque marked, "Refer to drawer." It was proved that by the custom of London bankers, when a foreign cheque was paid to a banker by a customer, if the banker had no agent at the place where the cheque was payable, he would send the cheque direct to the banker on whom it was drawn demanding payment, and the banker would immediately either remit the money or return the cheque; and that cheques drawn on bankers in Jersey were considered foreign cheques. It was held that there was a due presentment for payment of the cheque according to the custom of bankers; and that C. had been guilty of no laches so as to make the cheque his own.

Presentment by Post.—The Bills of Exchange Act provides—

45.—(8.) Where authorized by agreement or usage a presentment through the post-office is sufficient (*c*).

(*a*) See *infra*, on this page.

(*b*) (1874), L. R. 9 Q. B. 428.

(*c*) See also sect. 41 (1) (*e*).

Presentment in this way was treated as effective in the above-cited case of *Heywood v. Pickering* (d).

It was also recognised in *Prideaux v. Criddle* (e). There A. drew a cheque on H. & Co., bankers at Falmouth, in favour of the defendant on the 4th of June, and the defendant paid it into the bank of the plaintiffs (his bankers), at Truro, on the 5th. On the same day the plaintiffs sent the cheque to B. & Co., their agents in London, who received it on the 6th, and on the same day presented it through the country clearing-house to H. & Co.'s agents in London. On the same day H. & Co.'s agents forwarded the cheque to H. & Co. at Falmouth, who received it on the 7th. On that day H. & Co.'s agents in London failed. On the 7th B. & Co. wrote to H. & Co. to return the cheque or to pay it. On the 8th H. & Co. wrote declining to do either, and stopped payment on the following day. The plaintiffs gave the defendant notice of dishonour on the 9th. It was held that, if the plaintiffs had sent the cheque to an agent at Falmouth, that agent would have been entitled to another day to present the cheque for payment; sending the cheque to London through the clearing-house did not take any longer time; and that there had been no delay in the presentment of the cheque; that, as the notice of dishonour was given on the day following that on which the cheque was dishonoured, it was given in due time; and that the plaintiffs (who had entered the amount to the defendant's credit) were, therefore, entitled to debit the defendant with the amount of the cheque on its not being paid.

In the course of his judgment upon a case stated for the opinion of the Court, Lush, J., said: "According to the opinion of Erle, C. J., in the cases cited (f), a presentment through the post-office is a reasonable mode of presentment; it is a very common mode, and having regard to the commercial business of this country, it may be said to be a proper mode of presentment. . . . It was further objected that, although due notice of dishonour was given, the cheque itself was not handed over. I think that makes no difference in the liability of the defendant in the present action,

(d) See p. 428, *supra*. Cf. also *Bailey v. Bodenham*, cited at p. 427, *supra*.

(e) (1869), L. R. 4 Q. B. 455.

(f) *Hare v. Henty*, cited at p. 426, *supra*, and *Bailey v. Bodenham*, cited at p. 427, *supra*.

nor does it affect any rights he may have against the drawer of the cheque. It is sufficient that the defendant received notice of the dishonour of the cheque in time to enable him to give a valid notice to the drawer."

Extension of Time by Circumstances.—Special circumstances may render it not unreasonable that a cheque has not been presented within the time usually regarded as proper. Thus, in *Firth v. Brooks* (g), the defendant's son on Friday, at nine o'clock p.m., called at the residence of the plaintiffs' salesman, five miles from Blackburn, and paid him a cheque on a Liverpool bank. The salesman was ill at the time, but on the following Monday he handed the cheque to the plaintiffs at their place of business at Blackburn, and it was sent off the same day by the plaintiffs to their agents at Liverpool, and on Tuesday morning it was presented and payment refused. It was held that there had been no unreasonable loss of time on the plaintiffs' part in presenting the cheque for payment. "By the conduct of the defendant," said Crompton, J., "the cheque did not, for any practicable business purpose, come to the hands of the plaintiffs' agent till Saturday, and we ought, therefore, to treat it as if it were in fact a handing over of it on Saturday; for it is clear that the defendant never intended that Kershaw should do more than take it to his master on the following morning. Then there was no laches on the plaintiffs' part" (h).

In *Bond v. Warden* (i) a cheque for 4,700*l.*, drawn upon the Lutterworth Bank, was given to A., at Lutterworth, on the 20th April, after banking hours, in payment for an estate. A., who lived three miles from Lutterworth, immediately handed the cheque to B., to be placed to A.'s account at the Rugby Bank. Rugby is six miles from Lutterworth. On the arrival of the cheque the same day at Rugby, the Rugby Bank had closed, but the cheque was deposited with one of the partners of that bank for the night, and on the morning of the 21st it was paid into the bank, and on the same day transmitted by post to the Lutterworth bankers, with

(g) (1861), 4 L. T. 467.

16 L. T. 361.

(h) Cf. *Stringfield v. Lanezzari* (1867),

(i) (1845), 1 Coll. 583.

directions to send the amount to London. The Lutterworth bankers received the cheque early on the 22nd. At half-past one o'clock on that day they stopped payment. It was held that the deposit of the cheque with the Rugby bankers was a reasonable course on the part of A.; and consequently, that the presentment to the Lutterworth Bank was in time to prevent the cheque from becoming his cheque, and that the debt was still due to him.

CHAPTER III.

PRESENTMENT OF BILLS FOR ACCEPTANCE.

Duty of Banker.

As the agent of his customer the banker is under the obligation of using all reasonable diligence to secure acceptance of bills and due payment of bills and other securities remitted to him for collection. He is bound to do, not only what is legally imperative upon a holder, but also what is prudent in the interests of his customer.

In *The Bank of Van Diemen's Land v. The Bank of Victoria* (a) the facts were as follows: The Bank of Van Diemen's Land were indorsers of a bill drawn by G. on G. & Co., at Melbourne, at fifteen days after sight. The bill was transmitted by the Bank of Van Diemen's Land to the Bank of Victoria, their agents at Melbourne, for presentment. The Bank of Victoria received the bill at one o'clock on Friday, and at two o'clock on the same day the bill was presented by their clerk to the drawees, G. & Co., for acceptance, and left with them for that purpose. On Saturday, the following day, an acceptance was written by one of the firm of G. & Co. across the face of the bill, and the bill so accepted was handed to a clerk to be delivered in the usual course of business, and at half-past eleven o'clock on that day a clerk of the Bank of Victoria called upon the drawees and asked for the bill. He was told by the clerk of the drawees that the bill had been mislaid, and requested to call again on Monday, which he agreed to do, as, according to the custom in Melbourne, business closed at twelve o'clock on Saturdays. Before the Monday arrived certain circumstances had led G. & Co. to doubt whether the remittances which

(a) (1871), L. R. 3 P. C. 526.

were to have been made against the bill would be coming forward, and on the Monday morning before the clerk called for the bill G. & Co. cancelled their acceptance written across the bill. When the clerk called, he was told that the bill was ready to be delivered, but that, in the absence of the clerk who had charge of it, it could not then be got at, and he was requested to call on Tuesday. He called on that day and obtained the bill, but with the acceptance of the drawees cancelled. G. became insolvent, and the Bank of Van Diemen's Land, having received nothing in respect of the bill, brought an action against the Bank of Victoria, as their agents, for negligence. The evidence did not show any uniform usage at Melbourne to present bills the same day for acceptance. The custom to close at twelve o'clock on Saturdays was proved. The judge put it to the jury whether they thought that the Bank of Victoria was guilty of negligence or a breach of duty in not demanding that the bill should be delivered up on Saturday accepted or unaccepted, and the jury answered that, strictly speaking, there was a neglect, but, considering the respectability of the drawees, and Saturday being a short day, the Bank of Victoria was excusable in leaving the bill. The jury found for the plaintiffs with nominal damages, and an application by the plaintiffs to increase the damages to 3,000*l.*, the amount of the bill, was refused by the Supreme Court. It was held by the Judicial Committee (affirming that judgment), that in the circumstances, and considering the position of the drawees, there was no such negligence by the defendants as agents as to entitle the plaintiffs to substantial damages; and, further, that, although the judge was wrong in directing the jury on what was a matter of law and not fact, yet that the substance of the answer of the jury was, that it being the ordinary course to leave a bill for acceptance for twenty-four hours, and those twenty-four hours running out on Saturday not before two o'clock, it was an excusable neglect to postpone the demand for an answer until the opening of the drawee's counting-house on Monday. The duty of an agent is to be measured by considerations arising in particular cases; his duty is to obtain acceptance of the bill, and it may be prudent, in circumstances, from the respectability of the drawee, not to press for acceptance in such a way as to lead to a refusal, providing that proper steps are taken

within the limit of time which will preserve the rights of his principal against the drawee.

In delivering the judgment of the Privy Council, Lord Cairns said: "Now, the first question which their Lordships have to consider is, what is the meaning of the term 'unreasonable time,' as between persons circumstanced as the plaintiffs and the defendants were? The defendants were the agents of the plaintiffs. The law does not lay down as an absolute rule any time which is reasonable or unreasonable, as between persons standing in this relation, for the execution by the agent of the duty which is imposed upon him. But inasmuch as the object of the transmission of a bill of this kind from principal to agent is to obtain the acceptance and the payment of the bill, or, if it is not accepted, to guard the rights of the principal against the drawer in case recourse is to be had to the drawer, their Lordships are of opinion that the duty of the agent must be measured by those considerations, and that the duty of the agent is to obtain acceptance of the bill, if possible, but not to press unduly for acceptance in such a way as to lead to a refusal, provided that the steps for obtaining acceptance or refusal are taken within that limit of time which will preserve the right of his principal against the drawer. Now, bearing in mind that this is, therefore, the gist of the action—to try whether this duty was or was not performed by the defendants, we turn to what are the facts of the case. . . . It is not disputed that, as between the Monday, when the second call was made, and the Tuesday there was delay; and if during that interval any damage had accrued to the plaintiffs, there might have been a right of action and a right to obtain indemnity for the damage that had so accrued. Upon that there was no dispute. Neither was there any dispute upon this, that the bill was presented for acceptance to the drawees in due and proper time; in fact, within one hour after it was received. The whole question, therefore, arises upon the events of the Saturday, the 9th of February. Was, or was it not, a justifiable act in the clerk of the defendants when he called upon the Saturday at about half-past eleven, and when he was told that the bill had been mislaid and was requested to call again on Monday, to assent to that request, and, without demanding a distinct and positive answer at that time or re-delivery of the bill, to agree to call again on the Monday? . . . Their Lordships . . . have no doubt that what

the jury meant to express . . . was this,—that it being the ordinary course to leave a bill for acceptance for twenty-four hours, and those twenty-four hours running out upon Saturday not before two o'clock, which would be two hours after business had ceased, it was a natural and justifiable act to postpone the demand for an answer until the re-opening of the counting-house on Monday morning, and that the clerk was justified in assenting to the request that, without waiting any longer on Saturday, he would return on Monday and then apply for the bill. Their Lordships understand that to be the meaning of the jury, and they assent to the view the jury took, that a fair and proper excuse was shown to them for what otherwise would have been a neglect on the part of the bank, who were the agents to the plaintiffs."

The Obligation to Present.—The Bills of Exchange Act provides—

39.—(1.) Where a bill is payable after sight, presentment for acceptance is necessary in order to fix the maturity of the instrument.

(2.) Where a bill expressly stipulates that it shall be presented for acceptance, or where a bill is drawn payable elsewhere than at the residence or place of business of the drawee, it must be presented for acceptance before it can be presented for payment.

(3.) In no other case is presentment for acceptance necessary in order to render liable any party to the bill.

(4.) Where the holder of a bill, drawn payable elsewhere than at the place of business or residence of the drawee, has not time, with the exercise of reasonable diligence, to present the bill for acceptance before presenting it for payment on the day that it falls due, the delay caused by presenting the bill for acceptance before presenting it for payment is excused, and does not discharge the drawer and indorsers.

Even where presentment for acceptance is optional, as between the holder and the parties liable upon the bill, the banker should nevertheless present it for acceptance with business-like promptitude and discretion. If he neglects his duty in this respect he may be liable for the consequences (*b*).

(*b*) See the judgment in *Bank of Van Diemen's Land v. Bank of Victoria*, cited at pp. 432—435, *supra*; and Chitty on Bills, 11th ed. p. 194; Pothier, 128.

“It is in all cases advisable for the holder of an unaccepted bill to present it for acceptance without delay; for, in case of acceptance, the holder obtains the additional security of the acceptor, and, if acceptance be refused, the antecedent parties become liable immediately. It is advisable, too, on account of the drawer, for, by receiving early advice of dishonour, he may be better able to get his effects out of the drawee’s hands” (e).

Time for Presentment. 40.—(1.) Subject to the provisions of this Act (d), when a bill payable after sight is negotiated, the holder must either present it for acceptance or negotiate it within a reasonable time.

(2.) If he do not do so, the drawer and all indorsers prior to that holder are discharged.

(3.) In determining what is a reasonable time within the meaning of this section, regard shall be had to the nature of the bill, the usage of trade with respect to similar bills, and the facts of the particular case.

“The bill,” said Tindal, C. J., in *Mellish v. Rawdon* (e), “must be forwarded . . . within a reasonable time under all the circumstances of the case, and . . . there must be no unreasonable or improper delay. Whether there has been, in any particular case, reasonable diligence used, or whether unreasonable delay has occurred, is a mixed question of law and fact, to be decided by the jury, acting under the direction of the judge, upon the particular circumstances of each case.”

In *Shute v. Robins* (f) a bill drawn by bankers in the country on their correspondents in London, payable after sight, and indorsed to the traveller of the plaintiffs, had been transmitted by him to the plaintiffs after the interval of a week, and they, four days later, had transmitted it for acceptance. Before it was presented to the drawees, the drawer had become bankrupt, and they consequently refused to accept. If the bill had been sent by the traveller to the plaintiffs as soon as he received it, they would have been able to get it accepted before the bankruptcy. Lord Tenterden thought this delay was not unreasonable, and the jury concurred. “What-

(e) Byles on Bills, 16th ed. p. 211.

570.

(d) See sect. 41 (2).

(f) (1828), 3 C. & P. 80; 1 Moo. & M.

(e) (1832), 9 Bing. 416; 2 Moo. & Sc.

133.

ever strictness," said his Lordship, "may be required with respect to common bills of exchange payable after sight, it does not seem unreasonable to treat bills of this nature, drawn by bankers on their correspondents, as not requiring immediate presentment, but as being retainable by the holders for the purpose of using them, within a moderate time (for indefinite delay, of course, cannot be allowed), as part of the circulating medium of the country" (g).

Manner of Presentment. 41.—(1.) A bill is duly presented for acceptance which is presented in accordance with the following rules:

- (a) The presentment must be made by or on behalf of the holder to the drawee or to some person authorized to accept or refuse acceptance on his behalf at a reasonable hour on a business day (h) and before the bill is overdue:
- (b) Where a bill is addressed to two or more drawees, who are not partners, presentment must be made to them all, unless one has authority to accept for all, then presentment may be made to him only:
- (c) Where the drawee is dead presentment may be made to his personal representative:
- (d) Where the drawee is bankrupt, presentment may be made to him or to his trustee:
- (e) Where authorized by agreement or usage, a presentment through the post-office is sufficient (i).

In the case of a bill domiciled for payment at a bank, presentment for acceptance at the bank is not sufficient (k).

It is "part of the ordinary custom of merchants to leave a bill for acceptance twenty-four hours with the person upon whom it is drawn" (l). The banker must regulate his conduct accordingly (m). If the twenty-four hours expires after business hours on a Saturday, this fact may be taken into consideration in deciding whether or not it is reasonable on the part of the banker to leave the matter over until the following Monday (n).

(g) See also *Fry v. Hill* (1817), 7 Taunt. 397; *Straker v. Graham* (1839), 4 M. & W. 721; *Ramchurn Mullick v. Luchmeechund Radakissen* (1854), 9 Moo. P. C. 46; 2 C. L. R. 1664.

(h) See pp. 101, *supra*, and 441, *infra*.

(i) See pp. 428, 429, *supra*.

(k) See Chitty on Bills, 11th ed. p. 196, citing 2 Pardess. No. 360.

(l) Per Lord Cairns, delivering the judgment of the Privy Council in *Bank of Van Diemen's Land v. Bank of Victoria* (1871), L. R. 3 P. C. 526, at p. 543.

(m) See the case cited in the last note.

(n) *Ibid.* See also p. 408, *supra*.

"Where a bill is, in the usual course of business, left for acceptance, it is the duty of the party who leaves it to call again for it, and to inquire whether it has been accepted or not. It is not the duty of the other person to send it to him, unless there is a usual course of dealing between the particular individuals concerned so to do" (o).

Excuses for Non-Presentation. 41.—(2.) Presentment in accordance with these rules is excused, and a bill may be treated as dishonoured by non-acceptance—

- (a) Where the drawee is dead or bankrupt, or is a fictitious person, or a person not having capacity to contract by bill:
- (b) Where, after the exercise of reasonable diligence, such presentment cannot be effected:
- (c) Where, although the presentment has been irregular, acceptance has been refused on some other ground.

(3.) The fact that the holder has reason to believe that the bill, on presentment, will be dishonoured does not excuse presentment.

Dishonour by Non-Acceptance. 42.—(1.) When a bill is duly presented for acceptance and is not accepted within the customary time, the person presenting it must treat it as dishonoured by non-acceptance. If he do not, the holder shall lose his right of recourse against the drawer and indorsers.

43.—(1.) A bill is dishonoured by non-acceptance—

- (a) When it is duly presented for acceptance, and such an acceptance as is prescribed by this Act is refused or cannot be obtained; or
- (b) When presentment for acceptance is excused and the bill is not accepted.

(2.) Subject to the provisions of this Act (p), when a bill is dishonoured by non-acceptance, an immediate right of recourse against the drawer and indorsers accrues to the holder, and no presentment for payment is necessary.

Qualified Acceptance. 44.—(1.) The holder of a bill may refuse to take a qualified acceptance (q), and if he does not obtain an unqualified acceptance may treat the bill as dishonoured by non-acceptance.

(2.) Where a qualified acceptance is taken, and the drawer

(o) Per Bayley, J., in *Jeune v. Ward* (1818), 1 B. & Ald. 653, at p. 659.

(p) See sect. 65.

(q) As to qualified acceptances, see p. 349, *supra*.

or an indorser has not expressly or impliedly authorized the holder to take a qualified acceptance, or does not subsequently assent thereto, such drawer or indorser is discharged from his liability on the bill.

The provisions of this sub-section do not apply to a partial acceptance, whereof due notice has been given. Where a foreign bill has been accepted as to part, it must be protested as to the balance.

(3.) When the drawer or indorser of a bill receives notice of a qualified acceptance, and does not within a reasonable time express his dissent to the holder he shall be deemed to have assented thereto.

CHAPTER IV.

PRESENTMENT OF BILLS AND NOTES FOR
PAYMENT.

Rules as to Presentment.—The Bills of Exchange Act provides—

45. Subject to the provisions of this Act (*a*) a bill must be duly presented for payment. If it be not so presented the drawer and indorsers shall be discharged.

A bill is duly presented for payment which is presented in accordance with the following rules:—

- (1.) Where the bill is not payable on demand, presentment must be made on the day it falls due (*b*).
- (2.) Where the bill is payable on demand (*c*), then, subject to the provisions of this Act, presentment must be made within a reasonable time after its issue in order to render the drawer liable, and within a reasonable time after its indorsement, in order to render the indorser liable (*d*).

In determining what is a reasonable time regard shall be had to the nature of the bill, the usage of trade with regard to similar bills, and the facts of the particular case (*e*).

- (3.) Presentment must be made by the holder or by some person authorized to receive payment on his behalf at a reasonable hour on a business day (*f*), at the proper place as hereinafter defined, either to the person designated by the bill as payer, or to some person authorized to pay or refuse payment on his behalf if with the exercise of reasonable diligence such person can there be found.

(*a*) See sect. 39 (4), and sect. 46,
infra.

(*b*) See sect. 14.

(*c*) See sects. 10, 74.

(*d*) See *Moule v. Brown*, cited at p. 426,
supra.

(*e*) See pp. 419—431, *supra*.

(*f*) See p. 101, *supra*.

(4.) A bill is presented at the proper place:—

(a) Where a place of payment is specified in the bill and the bill is there presented.

(b) Where no place of payment is specified, but the address of the drawee or acceptor is given in the bill, and the bill is there presented.

(c) Where no place of payment is specified, and no address given, and the bill is presented at the drawee's or acceptor's place of business if known, and if not, at his ordinary residence, if known.

(d) In any other case, if presented to the drawee or acceptor wherever he can be found, or if presented at his last known place of business or residence.

(5.) Where a bill is presented at the proper place, and after the exercise of reasonable diligence no person authorized to pay or refuse payment can be found there, no further presentment to the drawee or acceptor is required.

(6.) Where a bill is drawn upon or accepted by two or more persons who are not partners, and no place of payment is specified, presentment must be made to them all.

(7.) Where the drawee or acceptor of a bill is dead, and no place of payment is specified, presentment must be made to a personal representative, if such there be, and with the exercise of reasonable diligence he can be found.

(8.) Where authorized by agreement or usage a presentment through the post-office is sufficient (g).

A "reasonable hour" must be taken to mean, in the case of a banker, any time within banking hours (h); in the case of presentment to a trader at his place of business, any time within business hours, these being more extended than the former (i); and in the case of presentment to a private person at his residence, probably any time at which it is reasonable to expect an answer to a knock or ringing at his front door (k).

An ineffectual presentment at an unreasonable hour will be no evidence of dishonour (l).

(g) See pp. 428, 429, *supra*.

(h) *Whitaker v. Bank of England* (1835), 1 C. M. & R. 744, at p. 750.

(i) See *Wilkins v. Jadis* (1831), 2 B. & Ad. 188; *Parker v. Gordon* (1806), 7 East, 385; *Leftley v. Mills* (1791), 4

T. R. 170; *Elford v. Teed* (1813), 1 M. & S. 28.

(k) *Triggs v. Newnham* (1825), 10 Moo. 249; 1 C. & P. 631; *Wilkins v. Jadis*, see last note.

(l) *Parker v. Gordon*, see note (i), *supra*.

If the drawee has changed his address, or the bill is not directed to him at any particular place, the banker must use reasonable diligence to find him out (*m*).

Where a bill or note is made payable at alternative places, *e.g.*, at banking-houses in Maidstone and in London, presentment at either place is sufficient (*n*).

Bill Payable at a Bank.—When a bill of exchange is addressed to the drawee with his private residence added, and is accepted by him payable at his banker's, in order to charge an indorser, presentment at the banker's is necessary, and presentment at the acceptor's place of residence is not sufficient. That there were no effects of the acceptor in the banker's hands at the time the bill became due does not excuse the want of due presentment as against an indorser (*o*).

Where the banker is the holder at its maturity of a bill accepted payable at his banking-house, and the acceptor has no balance there sufficient to meet it, no formal presentment to the acceptor is necessary (*p*).

Presentment through the Clearing-house.—This subject is treated above, at pages 310—319 and 423.

Excuses Available to Holder. 46.—(1.) Delay in making presentment for payment is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct or negligence. When the cause of delay ceases to operate, presentment must be made with reasonable diligence.

(2.) Presentment for payment is dispensed with—

(a) Where, after the exercise of reasonable diligence, presentment, as required by this Act, cannot be effected.

The fact that the holder has reason to believe that the bill will, on presentment, be dishonoured does not dispense with the necessity for presentment.

(*m*) *Collins v. Butler* (1738), 2 Stra. 1087; *Bateman v. Joseph* (1810), 12 East, 433; *Smith v. Bank of New South Wales* (1872), L. R. 4 P. C. 194.

(*n*) *Beeching v. Gower* (1816), 1 Holt's N. P. 313.

(*o*) *Saul v. Jones* (1858), 28 L. J. Q. B. 37; 1 El. & El. 59; 5 Jur. N. S. 220; 7 W. R. 47. Cf. the citation on p. 437, *supra*, from Chitty on Bills.

(*p*) *Bailey v. Porter* (1845), 14 M. & W. 44; 14 L. J. Ex. 244.

- (b) Where the drawee is a fictitious person.
- (c) As regards the drawer, where the drawee or acceptor is not bound, as between himself and the drawer, to accept or pay the bill, and the drawer has no reason to believe that the bill would be paid if presented (*g*).
- (d) As regards an indorser, where the bill was accepted or made for the accommodation of that indorser, and he has no reason to expect that the bill would be paid if presented.
- (e) By waiver of presentment, express or implied.

In *Hardy v. Woodroffe* (*r*) a promissory note made payable at Guildford was presented on the day when it became due at two banking-houses in Guildford, the maker then living in London. This was held a sufficient presentment.

The fact of the acceptor becoming bankrupt before the maturity of the bill does not excuse presentment (*s*).

Position of Acceptor. 52.—(1.) When a bill is accepted generally (*u*) presentment for payment is not necessary in order to render the acceptor liable (*x*).

(2.) When by the terms of a qualified acceptance presentment for payment is required, the acceptor, in the absence of an express stipulation to that effect, is not discharged by the omission to present the bill for payment on the day that it matures (*y*).

(3.) In order to render the acceptor of a bill liable it is not necessary to protest it, or that notice of dishonour should be given to him (*z*).

(*g*) See *Wirth v. Austin* (1875), 10 C. P. 689, where a cheque was drawn by a person who had good reason to believe it would be dishonoured.

(*r*) (1818), 2 Stark. 319.

(*s*) *Esdaile v. Sowerby* (1809), 11 East, 114, at p. 117; *Bowes v. Howe* (1813), 5 Taunt. 30.

(*u*) See sect. 19.

(*x*) Cf. *Walton v. Mascal* (1844), 13 M. & W. 452; *Black v. Ottoman Bank* (1862), 15 Moo. P. C. 472; *Carter v. White* (1883), 25 Ch. D. 666.

(*y*) If a bill is accepted payable at a banker's only, presentment for payment at the banker's is necessary in order to

render the acceptor liable: *Halstead v. Skelton* (1843), 5 Q. B. 86, at pp. 93, 94. Where a bill is accepted payable on giving up a bill of lading, the holder must be ready to give up the latter on presenting the former, but he is not bound to present on the day the bill falls due: *Smith v. Vertue* (1860), 30 L. J. C. P. 56; 9 C. B. N. S. 214.

(*z*) Thus if a bill is accepted at Plymouth payable at a bank in London, and upon presentation there it is dishonoured, notice of dishonour need not be given to the acceptor in order to render him liable: *Treacher v. Hinton* (1821), 4 B. & Ald. 413.

(4.) Where the holder of a bill presents it for payment, he shall exhibit the bill to the person from whom he demands payment, and when a bill is paid the holder shall forthwith deliver it up to the party paying it.

Promissory Notes.

Time for Presentment. 86.—(1.) Where a note payable on demand has been indorsed, it must be presented for payment within a reasonable time of the indorsement. If it be not so presented the indorser is discharged.

(2.) In determining what is a reasonable time regard shall be had to the nature of the instrument, the usage of trade, and the facts of the particular case.

In *Chartered Mercantile Bank of India, London and China v. Dickson* (a) it was held that, in determining whether a note has been presented within a reasonable time, regard must be paid to the circumstances of the particular case. There a note dated the 16th February, 1864, and indorsed, was made payable on demand, but its payment was not contemplated by the makers at any immediate or specific date. It was not presented for payment until the 14th December in the same year. The Judicial Committee held that, as it appeared from the evidence that the note was meant to be, to a greater or less extent, a continuing security, the delay in presentation was, in the circumstances of the case, not unreasonable, and that the holders were entitled to recover.

“The cases of bills of exchange and of cheques,” said Lord Cairns, delivering the judgment of the Committee (b), “stand upon a footing obviously different, and the law as to them does not by any means of necessity decide the present question. . . . The inquiry, which we have assumed to be the proper one, is a mixed question of law and of fact.”

Currency of Note. 86.—(3.) Where a note payable on demand is negotiated, it is not deemed to be overdue, for the purpose of affecting the holder with defects of title of which he had no notice, by reason that it appears that a reasonable time for presenting it for payment has elapsed since its issue (c).

(a) (1871), L. R. 3 P. C. 574.

(b) At pp. 579, 584.

(c) See sect. 10.

In *Brooks v. Mitchell* (*d*) it was held that a note payable on demand could not be treated as overdue, so as to affect an indorsee with any equities against the indorser, merely because it had been indorsed fourteen years after its date and no interest had been paid on it for three years before the indorsement.

“If,” said Parke, B., “a promissory note payable on demand is, after a certain time, to be treated as overdue, although payment has not been demanded, it is no longer a negotiable instrument. But a promissory note payable on demand is intended to be a continuing security. It is quite unlike the case of a cheque, which is intended to be presented speedily.”

So in *Glasscock v. Balls* (*e*) Lord Esher, M. R., said: “The plaintiff cannot be said to have taken the note when overdue, because it was not shown that payment was ever applied for, and the cases show that such a note is not to be treated as overdue merely because it is payable on demand and bears date some time back. Under such circumstances, *prima facie* the indorsee for value without notice is entitled to recover on the note. It lies on the defendant to bring the case within some recognised rule which would prevent such an indorsee from recovering upon the note. It has been held that there may be a defence to an action by a *bona fide* indorsee for value, where the note has been paid and has come back into the maker’s hands before it was indorsed to the plaintiff. That defence does not arise in respect of any merits of the defendant, but because the Stamp Act has not been complied with. In such a case it has been held that there was a re-issue of the note, and therefore the case stood on the same footing as if the note had been then issued for the first time without a stamp. . . . If a negotiable instrument remains current, even though it has been paid, there is nothing to prevent a person to whom it has been indorsed for value without knowledge that it has been paid from suing.”

Statute of Limitations.—In the case of a note payable on demand the Statute of Limitations begins to run in favour of the maker at the date of the note (*f*).

Position of Maker and Indorser. 87.—(1.) Where a promis-

(*d*) (1841), 9 M. & W. 15.

(*e*) (1889), 24 Q. B. D. 13, at p. 15.

(*f*) *Norton v. Ellam* (1837), 2 M. &

W. 461; *Rumball v. Ball* (1711), 10

sory note is in the body of it made payable at a particular place, it must be presented for payment at that place in order to render the maker liable. In any other case, presentment for payment is not necessary in order to render the maker liable.

(2.) Presentment for payment is necessary in order to render the indorser of a note liable.

(3.) Where a note is in the body of it made payable at a particular place, presentment at that place is necessary in order to render an indorser liable; but when a place of payment is indicated by way of memorandum only, presentment at that place is sufficient to render the indorser liable, but a presentment to the maker elsewhere, if sufficient in other respects, shall also suffice (*g*).

The subject of the Presentment of Bank Notes is treated in Part VI. Chap. 1.

Note Payable at Bank.—In *Saunderson v. Judge* (*h*) A. had made a promissory note payable to B. or order, with a memorandum upon it that it would be paid at the house of C., who was A.'s banker. In the course of business the note was indorsed to C. In an action by C. against the indorser, it was held that it was not necessary to prove an actual demand on A. The Court laid it down that if a note be made payable at a particular house, a demand of payment at that house is as a demand on the maker, and added: "As they at whose house it was to be paid were themselves the holders of it, it was a sufficient demand for them to turn to their books and see the maker's account with them, and a sufficient refusal to find that he had no effects in their hands."

Where the maker wrote and signed the following across the face of a promissory note—"Payable at the London and Provincial Bank, Walthamstow"—it was held that the note was not made payable at a particular place "in the body of it" within sect. 87 (1) (*i*).

Mod. 38; *Meggison v. Harper* (1833), 2 C. & M. 322; 4 Tyr. 94. Cf. *Hartland v. Jukes* (1863), 32 L. J. Ex. 162; 1 H. & C. 667; 9 Jur. N. S. 180; 7 L. T. 792; 11 W. R. 519.

(*g*) Cf. sect. 89, and cases cited at pp. 442, 443, *supra*.

(*h*) (1795), 2 H. Bl. 509.

(*i*) *Stevenson v. Brown* (1902), 18 T. L. R. 268.

CHAPTER V.

NOTICE OF DISHONOUR.

Dishonour.—Non-acceptance has been dealt with at page 438. As to non-payment the Bills of Exchange Act provides—

47.—(1.) A bill is dishonoured by non-payment (a) when it is duly presented for payment and payment is refused or cannot be obtained, or (b) when presentment is excused and the bill is overdue and unpaid.

(2.)¹ Subject to the provisions of this Act (a), when a bill is dishonoured by non-payment, an immediate right of recourse against the drawer and indorsers accrues to the holder.

If payment is refused at any time on the last day of grace, the holder is entitled at once to give notice of dishonour to the drawer and the indorsers; though he will have no right of action upon the bill until the expiration of that day (b).

Necessity for Notice. 48. Subject to the provisions of this Act (c), when a bill has been dishonoured by non-acceptance or by non-payment, notice of dishonour must be given to the drawer and each indorser, and any drawer or indorser to whom such notice is not given is discharged; provided that—

(1.) Where a bill is dishonoured by non-acceptance, and notice of dishonour is not given, the rights of a holder in due course subsequent to the omission shall not be prejudiced by the omission.

(2.) Where a bill is dishonoured by non-acceptance, and due notice of dishonour is given, it shall not be necessary to give notice of a subsequent dishonour by non-payment unless the bill shall in the meantime have been accepted.

(a) Cf. sects. 65—68 as to acceptance and payment for honour.

(b) *Kennedy v. Thomas*, [1894] 2 Q. B. 759.

(c) See sect. 50.

"It is conceived that in all cases where, in consequence of the dishonour of bills or notes, made or become payable to bearer, a remedy arises on the consideration the transferor is entitled to notice of dishonour" (d).

In *Smith v. Mercer* (e) the plaintiffs had sold to the defendants goods to be paid for, according to the contract between the parties, by cash or "approved banker's bills." The defendants paid for them by an "approved banker's bill," which was dishonoured on presentment for acceptance. They were not parties to the bill, and received no notice of dishonour. In an action against them at the suit of the plaintiffs for the price of the goods, it was held that the defendants' liability was not more extensive than it would have been if they had indorsed the bill, and that they were therefore discharged, not having received due notice of dishonour.

But "a man merely guaranteeing the payment of a bill, but not a party to it, is not discharged by the neglect of the holder to give him notice of dishonour unless he has been actually prejudiced by such neglect" (f).

In *Van Wart v. Woolley* (g) Irving & Co., of New York, employed the plaintiff, who resided at Birmingham, to purchase goods for them in England by commission, and to ship such goods to them in America. On account of such purchases they sent to the plaintiff a bill drawn by Cranston & Co. upon Greg and Lindsay in London. Irving & Co. did not indorse this bill. The plaintiff employed the defendants, who were his bankers at Birmingham, to present the bill for acceptance to the drawees. The defendants forwarded the bill to their London agents, Sir John Lubbock & Co., who presented the bill, which the drawees refused to accept. In consequence of the request of the drawees, Lubbock & Co. did not protest the bill for non-acceptance, or give notice to the defendants or to the plaintiff of the refusal to accept until the day of payment, when it was again presented and dishonoured. Before the bill arrived in this country, Cranston & Co. became bankrupt, and he had not, either when the bill was drawn or at

(d) Byles on Bills, 16th ed. p. 243. M. & S. 62.

Cf. Chalmers, 6th ed. p. 173.

(e) (1867), L. R. 3 Ex. 51. See, however, *Swinyard v. Bowes* (1816), 5

(f) Byles on Bills, 16th ed. p. 243.

(g) (1824), 3 B. & C. 439.

any time before it became due, any funds in the hands of Greg and Lindsay. The plaintiff sued the defendants, as his bankers, for neglecting to give him notice of the non-acceptance of the bill. It was held that the plaintiff could not recover the whole amount of the bill, but only such damages as he had sustained in consequence of having been delayed in the pursuit of his remedy against the drawer, on the ground that Irving & Co., not having indorsed the bill, were not entitled to notice of the dishonour, and still remained liable to the plaintiff for the price of the goods sent to them, while Cranston & Co. were not entitled to notice, as they had no funds in the hands of the drawee.

“It is evident,” said Lord Chief Justice Abbott, delivering the judgment of the Court of King’s Bench, “that the defendants (who cannot be distinguished from, but are answerable for their London correspondents, Sir John Lubbock & Co.) have been guilty of a neglect of the duty which they owed to the plaintiff, their employer, and from whom they received a pecuniary reward for their services. The plaintiff is, therefore, entitled to maintain his action against them, to the extent of any damage he may have sustained by their neglect. . . . If he still retains a remedy against them” (Irving & Co.), “and has only been delayed in the pursuit of such remedy as he might have had against the drawer, a bankrupt, the amount of his loss has not been inquired into or ascertained, and is probably much less than the amount of the bill.” Accordingly, as the Court held that the plaintiff did still retain such remedies, and as the jury had given a verdict for the full amount, a new trial was directed for the purpose of ascertaining the amount of the damage which had really been sustained by the plaintiff.

In *Crosse v. Smith* (*h*) it was held that a banker, acting as such for both the drawer and the acceptor of a bill, and who received it from the drawer and gave credit for it in an account current between them, and then, before it became due, received directions from the acceptor to stop the payment of it and did so accordingly, was not bound to give notice of the latter to the drawer; and that,

(*h*) (1813), 1 M. & S. 545.

notwithstanding that he had not given such notice, he might look to the drawer.

Rules as to Notice. 49. Notice of dishonour, in order to be valid and effectual, must be given in accordance with the following rules:—

(1.) The notice must be given by or on behalf of the holder, or by or on behalf of an indorser who, at the time of giving it, is himself liable on the bill.

(2.) Notice of dishonour may be given by an agent, either in his own name or in the name of any party entitled to give notice, whether that party be his principal or not.

(3.) Where the notice is given by or on behalf of the holder, it enures for the benefit of all subsequent holders and all prior indorsers who have a right of recourse against the party to whom it is given.

(4.) Where notice is given by or on behalf of an indorser entitled to give notice as hereinbefore provided, it enures for the benefit of the holder and all indorsers subsequent to the party to whom notice is given.

(5.) The notice may be given in writing or by personal communication, and may be given in any terms which sufficiently identify the bill, and intimate that the bill has been dishonoured by non-acceptance or non-payment (i).

Where the holder sent to the counting-house of the drawers for the purpose of giving notice of dishonour of a bill of exchange, during hours of business on two successive days, and the messenger knocked there, and made noise sufficient to be heard by persons within, and waited several minutes, the inner door of the counting-house being locked, it was held that he had done sufficient, without leaving a notice in writing, or sending it by the post, though some of the drawers lived at a small distance from the place (k).

49.—(6.) The return of a dishonoured bill to the drawer or an indorser is, in point of form, deemed a sufficient notice of dishonour.

(7.) A written notice need not be signed, and an insufficient written notice may be supplemented and validated by verbal communication. A misdescription of the bill shall not vitiate

(i) Cf. *Berridge v. Fitzgerald* (1869),
T. L. R. 4 Q. B. 639.

(k) *Crosse v. Smith* (1813), 1 M. & S.
545.

the notice unless the party to whom the notice is given is in fact misled thereby (*l*).

(8.) Where notice of dishonour is required to be given to any person, it may be given either to the party himself, or to his agent in that behalf.

(9.) Where the drawer or indorser is dead, and the party giving notice knows it, the notice must be given to a personal representative if such there be, and with the exercise of reasonable diligence he can be found.

(10.) Where the drawer or indorser is bankrupt, notice may be given either to the party himself or to the trustee.

(11.) Where there are two or more drawers or indorsers who are not partners, notice must be given to each of them, unless one of them has authority to receive such notice for the others.

(12.) The notice may be given as soon as the bill is dishonoured (*m*), and must be given within a reasonable time thereafter (*n*). In the absence of special circumstances, notice is not deemed to have been given within a reasonable time, unless—

(a) Where the person giving and the person to receive notice reside in the same place, the notice is given or sent off in time to reach the latter on the day after the dishonour of the bill (*o*).

(b) Where the person giving and the person to receive notice reside in different places, the notice is sent off on the day after the dishonour of the bill, if there be a post at a convenient hour on that day, and if there be no such post on that day then by the next post thereafter.

(13.) Where a bill when dishonoured is in the hands of an agent, he may either himself give notice to the parties liable on the bill, or he may give notice to his principal. If he give notice to his principal, he must do so within the same time as if he were the holder, and the principal upon receipt of such notice has himself the same time for giving notice as if the agent had been an independent holder.

Notice of Dishonour through London Agent and Country Banker.

—In *Bray v. Haden* (*p*) Lord Ellenborough held that a country

(*l*) See *Bromage v. Vaughan* (1846), 16 L. J. Q. B. 10; 9 Q. B. 608.

(*m*) *Kennedy v. Thomas*, cited at p. 447, *supra*; *Burbridge v. Mannors* (1812), 3 Camp. 193; *Hine v. Alleley* (1833), 4 B. & Ad. 624.

(*n*) Cf. *Hirschfeld v. Smith* (1866), L. R. 1 C. P. 340.

(*o*) See *Smith v. Mullett* (1809), 2 Camp. 208; *Hilton v. Fairclough* (1811), 2 Camp. 633.

(*p*) (1816), 5 M. & S. 68.

banker, with whom a bill of exchange payable in London is deposited, has an entire day after receiving notice of its dishonour to transmit the same to his customer, so that notice by the next day's post, though it be not the next post, will be time enough. There the indorsee of a bill payable at a banker's in London deposited it with his bankers in the country, who caused it to be duly presented for payment on the 14th, when it was dishonoured, and notice was sent by the post to the country bankers on the 15th, which reached them on the morning of the 17th (being Sunday). They on the next day sent notice by the post to the indorsee, but not before twelve at noon, at which time the post set out for the place where the indorsee resided. It was held that this notice was within time.

Notice through Branch Banks.—For the purpose of receiving and transmitting notice each branch may be considered as a distinct holder of the bill.

In *Clode v. Bayley* (q) a bill of exchange was indorsed to a branch of the National Provincial Bank of England at Portmadoc, who sent it to the Pwllheli branch of the same bank, who indorsed it to the head establishment in London. It was held that, for the purpose of estimating the time at which notice of dishonour should be given, the different branches were to be regarded as distinct. It was thought reasonable that the bill should be sent successively to the branch banks through which it had come to the principal bank before giving the notice. Lord Abinger pointed out that it was not possible for the bank in London to know from whom the bill came; and that it was accordingly necessary, in the ordinary course of the transaction of business, that it should be sent to the branches before notice of dishonour could properly be given.

In *Fielding & Co. v. Corry* (r) the Cardiff branch of the County of Gloucester Bank received from a customer a bill of exchange, and forwarded it to the London and Westminster Bank in London for presentation. The bill was dishonoured, and the London bank on the following day sent notice of dishonour by post to the Ciren-

(q) (1843), 12 M. & W. 51, cited with approval in *Prince v. Oriental Bank Corporation* (1878), 3 A. C. 325, at

p. 332. Cf. *Willis v. Bank of England* (1835), 4 A. & E. 21.

(r) [1898] 1 Q. B. 268.

chester branch of the County of Gloucester Bank. On the following day they discovered the mistake, and telegraphed notice of dishonour to the Cardiff branch. The notice given by that branch and all subsequent notices, including that to the defendant, who was an indorser of the bill, were sent in due time. In an action by the holder of the bill it was held by the majority in the Court of Appeal that notice of dishonour within sect. 49, sub-sects. 12 and 13, of the Bills of Exchange Act had been given by the London and Westminster Bank.

"It seems to me," said Lord Justice Smith, "that we should be frittering away the provisions of the statute if we were to hold that a mistake in an address could not be rectified, if the effect of the rectification is that the person to whom notice is sent in point of fact gets notice in due course and in due time." Lord Justice Rigby put his view thus: "I think it is not material that the notice has been wrongly addressed, provided that this has not prevented it getting to the proper person within the proper time." Lord Justice Rigby further said that he "thought the notice was sufficient whether the Cardiff branch is treated as separate from and independent of the Cirencester branch or not."

Lord Justice Collins, however, who dissented, thought that different branches of a bank cannot be treated as one and the same person for the purpose of giving and receiving notice of dishonour, and that the judgments of his colleagues involved the proposition that they could. But it is conceived that it would be unsafe to treat their decision as an authority in that sense (*s*).

Notice to Antecedent Parties. 49.—(14.) Where a party to a bill receives due notice of dishonour, he has after the receipt of such notice the same period of time for giving notice to antecedent parties that the holder has after the dishonour.

Miscarriage of Notice. 49.—(15.) Where a notice of dishonour is duly addressed (*t*) and posted, the sender is deemed to have given due notice of dishonour, notwithstanding any miscarriage by the post-office.

Excuses for Delay. 50.—(1.) Delay in giving notice of dishonour is excused where the delay is caused by circumstances beyond

(*s*) See pp. 87, 88, *supra*.

Q. B. 828; *Berridge v. Fitzgerald* (1869),

(*t*) See *Burmester v. Barron* (1852), 17 L. R. 4 Q. B. 639.

the control of the party giving notice, and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate the notice must be given with reasonable diligence.

When Notice dispensed with. 50.—(2.) Notice of dishonour is dispensed with—

- (a) When, after the exercise of reasonable diligence, notice as required by this Act cannot be given to or does not reach the drawer or indorser sought to be charged.

The failure of the holder of a bill of exchange, after the exercise of reasonable diligence, at the time the bill is dishonoured, to find the drawer at the address he has given, does not dispense with notice of dishonour, if an address at which he is to be found comes to the knowledge of the holder before he commences an action on the bill against the drawer (*u*).

50.—(2.) (b) By waiver express or implied. Notice of dishonour may be waived before the time of giving notice has arrived, or after the omission to give due notice.

- (c) As regards the drawer in the following cases, namely,
 - (1) where drawer and drawee are the same person,
 - (2) where the drawee is a fictitious person or a person not having capacity to contract, (3) where the drawer is the person to whom the bill is presented for payment,
 - (4) where the drawee or acceptor is as between himself and the drawer under no obligation to accept or pay the bill (*x*), (5) where the drawer has countermanded payment.
- (d) As regards the indorser in the following cases, namely,
 - (1) where the drawee is a fictitious person or a person not having capacity to contract, and the indorser was aware of the fact at the time he indorsed the bill,
 - (2) where the indorser is the person to whom the bill is presented for payment, (3) where the bill was accepted or made for his accommodation.

(*u*) *Studdy v. Beesty* (1889), 60 L. T. 647.

(*x*) See *Carew v. Duckworth* (1869), L. R. 4 Ex. 313.

CHAPTER VI.

NOTING AND PROTEST.

THE Bills of Exchange Act provides—

51.—(1.) Where an inland bill has been dishonoured it may, if the holder think fit, be noted for non-acceptance or non-payment, as the case may be ; but it shall not be necessary to note or protest any such bill in order to preserve the recourse against the drawer or indorser.

(2.) Where a foreign bill (*a*), appearing on the face of it to be such, has been dishonoured by non-acceptance, it must be duly protested (*b*) for non-acceptance, and where such a bill, which has not been previously dishonoured by non-acceptance, is dishonoured by non-payment, it must be duly protested for non-payment. If it be not so protested, the drawer and indorsers are discharged. Where a bill does not appear on the face of it to be a foreign bill protest thereof in case of dishonour is unnecessary.

(3.) A bill which has been protested for non-acceptance may be subsequently protested for non-payment.

(4.) Subject to the provisions of this Act, when a bill is noted or protested, it must be noted on the day of its dishonour. When a bill has been duly noted, the protest may be subsequently extended as of the date of the noting.

(5.) Where the acceptor of a bill becomes bankrupt or insolvent or suspends payment before it matures, the holder may cause the bill to be protested for better security against the drawer and indorsers.

(6.) A bill must be protested at the place where it is dishonoured : Provided that—

(a) When a bill is presented through the post-office, and returned by post dishonoured, it may be protested at the place to which it is returned and on the day of its return if received during business hours, and if not

(a) See sects. 4, 89 (4).

(b) See sect. 94.

received during business hours, then not later than the next business day :

- (b) When a bill drawn payable at the place of business or residence of some person other than the drawee has been dishonoured by non-acceptance, it must be protested for non-payment at the place where it is expressed to be payable, and no further presentment for payment to, or demand on, the drawee is necessary.
- (7.) A protest must contain a copy of the bill, and must be signed by the notary making it, and must specify—
 - (a) The person at whose request the bill is protested :
 - (b) The place and date of protest, the cause or reason for protesting the bill, the demand made, and the answer given, if any, or the fact that the drawee or acceptor could not be found.
- (8.) Where a bill is lost or destroyed (c), or is wrongly detained from the person entitled to hold it, protest may be made on a copy or written particulars thereof.

(9.) Protest is dispensed with by any circumstance which would dispense with notice of dishonour. Delay in noting or protesting is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate the bill must be noted or protested with reasonable diligence.

Measure of Damages. 57.—(1.) The holder may recover from any party liable on the bill, and the drawer who has been compelled to pay the bill may recover from the acceptor, and an indorser who has been compelled to pay the bill may recover from the acceptor or from the drawer, or from a prior indorser—

- (a) The amount of the bill :
- (b) Interest thereon from the time of presentment for payment if the bill is payable on demand, and from the maturity of the bill in any other case :
- (c) The expenses of noting, or, when protest is necessary, and the protest has been extended, the expenses of protest (d).

Expenses of Noting.—By the Rules of the Supreme Court, 1883, Ord. XIII. r. 3 : “ Where the writ of summons is indorsed for a liquidated demand, whether specially or otherwise, and the defendant fails . . . to appear thereto, the plaintiff may enter

(c) See sects. 69, 70.

(d) See also sub-sects. 2 and 3.

final judgment for any sum not exceeding the sum indorsed on the writ" with interest and costs. In an action on a bill of exchange the writ was indorsed with a claim for the amount of the bill, and a further sum described as "bank charges." The defendant failed to appear, and the plaintiff entered final judgment for the sum indorsed. It was held that the words "bank charges" were a sufficient description of the expenses of noting, and that the writ was therefore indorsed for a liquidated demand within the meaning of the above rule (e).

Expenses of Protest.—In *In re English Bank of the River Plate, Ex parte Bank of Brazil* (f), a bank at Rio de Janeiro had drawn bills of exchange on a bank in London, and they had been duly accepted by such bank. The London bank went into liquidation before the bills matured, and, after the stoppage of the bank, the holders had them protested for better security, and they were accepted *supra* protest for the honour of the drawers by the drawers' London bankers. The bills were duly presented for payment to the acceptors, and were protested by the holders for non-payment. They were then presented to the bankers of the drawers, who paid the principal money due on the bills, together with the notarial charges thereon, which consisted partly of the expenses of protest for non-payment and partly of the expenses of protest for better security. The bankers of the drawers also charged the drawers a commission for accepting the bills. The drawers were admitted to prove in the winding-up of the London bank for the amount of the bills, and they claimed to prove also in respect of the notarial charges and commission. This claim the liquidator rejected.

It was held, upon summons for leave to prove in respect of the latter claims, that the applicants were entitled to prove for the expenses of protest for non-payment, as being expenses falling within sect. 51, sub-sect. 2, and sect. 57, sub-sect. 1, but that they were not entitled to prove in respect of the expenses of protest for better security nor for the commission, as under sect. 57 such expenses only as are "necessary" are recoverable. "The protest"

(e) *Dando v. Boden*, [1893] 1 Q. B. 318. Cf. *In re Gillespie, Ex parte Roberts* (1886), 18 Q. B. D. 286; *Lawrence v. Willcocks*, [1892] 1 Q. B. 696. (f) [1893] 2 Ch. 438.

mentioned in sect. 68, sub-sect. 6, means the protest for non-payment which is necessary. The Act not only does not give but excludes the expenses of the protest for better security (*g*).

Stamp Duty.

The Stamp Act, 1891 (*h*), provides—

90. The duty upon a notarial act, and upon the protest by a notary public of a bill of exchange or promissory note, may be denoted by an adhesive stamp, which is to be cancelled by the notary.

Where the duty on a bill or note does not exceed 1s., a protest is subject to the same duty as the bill or note, and in any other case to a duty of 1s. (*i*).

(*g*) Cf. *Banque Populaire de Bienne v. Cavé* (1895), 1 Com. Ca. 67, where it was held that the holder of a bill of exchange drawn abroad and dishonoured in England is entitled to recover no other charges than those provided for

by sect. 57 of the Act, and that, accordingly, banker's commission and brokerage are not recoverable.

(*h*) 54 & 55 Vict. c. 39.

(*i*) *Ibid.* Schedule.

CHAPTER VII.

PROPERTY IN DRAFTS PENDING COLLECTION.

THE proceeds of bills and other drafts remitted to the banker for collection when properly placed to the current account become, like cash paid in, the property of the banker, the customer having merely a personal right against him in respect thereof. But until collection, as a general rule, it is otherwise as to the bills or drafts themselves (*a*).

We have seen that, in the case of bills appropriated to a specific purpose, they remain the property of the customer until that purpose has been accomplished (*b*). Similar considerations apply in the present connection.

A bill remitted to a banker for collection, and not discounted or treated as cash by agreement or according to the course of business between the banker and his customer, remains the property, and continues in the legal possession, of the customer. If by any accident it is destroyed, without the default of the banker, the loss would not fall upon him, but upon the customer (*c*).

It is the same as regards a bank post bill (*d*), or any draft not payable on demand (*d*).

Bills in the hands of a banker for collection do not pass to his trustee in bankruptcy, for, by the course of business, bankers must have the goods of other people in their possession, and, accordingly, a false credit is not thereby held out to the world (*e*).

(*a*) See what is said on this subject in Part II. Chap. 2.

(*b*) See pp. 381—386, *supra*.

(*c*) Per Best, J., in *Thompson v. Giles* (1824), 2 B. & C. 422, at p. 433.

(*d*) *Ex parte Atkins* (1842), 3 M. D. &

De G. 103; 7 Jur. 95; 12 L. J. Bank. 28; *Thompson v. Giles*, see last note.

(*e*) See per Buller, J., in *Bryson v. Wylie* (1783), 1 B. & P. 83, note; and the argument in *Thompson v. Giles* (1824), 2 B. & C. 422, at p. 426.

If the bill has been entered short (*f*), this fact will be conclusive in favour of the customer's retention of ownership. If a bill has been entered as cash, the question will remain whether this has been done with the customer's consent.

Bills entered Short.

In *Zinck v. Walker* (*g*) it was laid down that bills remitted to a banker for a particular purpose and entered short by the banker are only considered as on deposit, and that the property in them is not altered. Accordingly if, while the bills remain in the banker's hand, he becomes bankrupt, they must be returned to the customer, subject to any lien that the banker may have had thereon (*h*).

Bills in Hands of Agent Banker.—So, in *Ex parte Rowton* (*i*), short bills remitted by a country bank to their banker in London, standing at the bankruptcy of the latter entered short in the usual way, and not being due, were ordered to be delivered up to the country bank, who, although not creditors when the petition was presented, the cash balance being against them, had since become so, by taking up the bankrupt's acceptances on their account. It was again laid down that short bills in the hands of a banker are specifically the property of the remitter, subject to a lien for the balance of the account.

In *Ex parte Buchanan, In the matter of Kensington* (*k*), the petitioners were bankers in Glasgow, and asked for an order for the delivery of certain short bills, which were in the hands of Kensington & Co., their correspondents in London, at the time of their bankruptcy. They undertook to leave with Kensington & Co.'s estate, bills sufficient to meet the acceptances, which it was liable for

(*f*) In *Giles v. Perkins* (1807), 9 East, 12, at p. 13, this expression is explained as follows: Bankers in London, upon the receipt of undue bills from a customer, do not carry the amount directly to his credit, but enter them short, as it is called; *i.e.*, note down the receipt of the bills in his account, with the amount and the times when due, in a previous (or inner)

column of the same page; which sums when received are carried forward into the usual cash column.

(*g*) (1777), 2 W. Bl. 1154.

(*h*) See also *Ex parte Dumas* (1754), 2 Ves. sen. 582; 1 Atk. 232; *Ex parte Oursell* (1756), Amb. 297.

(*i*) (1811), 17 Ves. 426; 1 Rose, 15.

(*k*) (1812), 1 Rose, 280; 19 Ves. 201.

on the petitioners' account. The Lord Chancellor ordered accordingly, except that he directed that the petitioners should give security that their bills would be paid when due.

A limited permission to discount will not affect the rights of the parties concerned, except to the extent specified (*l*).

Bills of Customer in Hands of Agent Banker.—In *Ex parte Froggatt, In re Parker* (*n*), where a short bill had been left with country bankers for collection in London, and had been indorsed by them to their agents in London, who had a lien upon them for advances to the country bankers, it was held, in the bankruptcy of the country bankers, that the proceeds of the bills, after satisfying the lien of the London bankers, ought to be distributed rateably among the depositors of the short bills.

Knight-Bruce, C. J., said: "I have always considered it plainly settled, that, when a country banker sends bills to his London agent, indorsed generally to receive payment of them, those bills, on the bankruptcy of the country banker, are not lost to the owners of them, although the London banker has usually a lien for the balance due to him from the country banker. . . . After satisfaction of the lien out of the proceeds of the bills, the residue must be distributed rateably among the bill holders, without any preference of one over another."

Bills entered as Cash.

In *Giles v. Perkins* (*n*) it was held that a customer paying bills, not due, into his bankers' in the country, whose custom it was to credit their customers for the amount of such bills, if approved, as cash, charging interest, was entitled to recover back such bills in specie from the bankers becoming bankrupt, the balance of his cash account independent of such bills being in his favour at the time of the bankruptcy; and that if payment were afterwards received upon such bills by the assignees, they were liable to refund it to the customer in an action for money had and received.

(*l*) *Ex parte Wakefield Bank, In re Boldero* (1812), 1 Rose, 243; *Ex parte Leeds Bank, In re Boldero* (1812), 1 Rose, 254.

(*m*) (1843), 3 M. D. & De G. 322; 7 Jur. 110.

(*n*) (1807), 9 East, 12.

“Every man,” said Lord Ellenborough, “who pays bills not then due into the hands of his bankers places them there, as in the hands of his agent, to obtain payment of them when due. If the banker discount the bill or advance money upon the credit of it, that alters the case; he then acquires the entire property in it, or has a lien on it *pro tanto* for his advance. The only difference between the practice stated of London and country bankers in this respect is, that the former, if overdrawn, has a lien on the bill deposited with him, though not indorsed; whereas the country banker who always takes the bill indorsed has not only a lien upon it, if his account be overdrawn, but has also his legal remedy upon the bill by the indorsement; but neither of them can have any lien on such bills until their account be overdrawn: and here the balance of the cash account at the time of the bankruptcy was in favour of the plaintiffs.”

In *Thompson v. Giles* (o) a customer was in the habit of indorsing and paying into his bankers' hands bills not due, which, if approved, were immediately entered (as bills) to his credit to the full amount, and he was then at liberty to draw for that amount by cheques on the bank. The customer was charged with interest upon all cash payments to him from the time when made, and upon all payments by bills from the time when they were due and paid: and had credit for interest upon cash paid into the bank from the time of the payment, and upon bills paid in from the time when the amount of them was received. The bankers paid away such bills to their customers as they thought fit. The bankers having become bankrupts, it was held that the customer might maintain trover against their assignees for bills paid in by him, and remaining in specie in their hands, the cash balance, independently of the bills, being in favour of the customer at the time of the bankruptcy.

In delivering judgment in this case, Mr. Justice Bayley said: “It has been argued for the defendants, that we must infer an agreement to have been made between the banker and his customer, that as soon as bills reached the hands of the former, the property should be changed. Undoubtedly, if there were any

(o) (1824), 2 B. & C. 422.

such bargain, the defendants would be entitled to our judgment; but if there be no such bargain, then the case of customer and banker resembles that of principal and factor, and the bills remaining in specie in the banker's hands will, notwithstanding the bankruptcy, continue the property of the customer. *Scott v. Surman* (o) and *Bolton v. Puller* (p) establish that as a general rule. That being so, is it probable that such a bargain as that suggested would be made? What benefit would the customer derive from having the bills considered as the property of the banker? In the absence of any valuable consideration, it seems to me that it would be very unreasonable in a banker to ask, and very imprudent in a customer to accede to such terms. I should not, therefore, be disposed lightly to infer such a contract. But it is said, that it must be inferred from the course of dealing between the parties, and from the usage of the bankrupts, and other bankers in the county of Lancaster. It appears, however, that the bills were not entered as cash, but as bills, and although the amount was carried into the cash column, it does not follow that the customer assented to their being considered as cash. It is only an undertaking on the part of the banker to answer drafts in advance to the amount of the bills so entered. By indorsing the bills paid in, or by giving a guarantee when he did not choose to indorse, the customer might enable the banker to negotiate the bills, and a *bonâ fide* holder might have a right to retain them. But the banker could only be justified in negotiating them when that was rendered a reasonable course by the state of the customer's account."

In *Ex parte Barkworth, In re Harrison* (q), undue bills of exchange were from time to time remitted to a banker by a customer, and indorsed to the banker. The course of dealing was that the bills were not entered short, but, though they were distinguished in the account as bills, the full amounts were entered in the cash column under the dates on which the bills were paid into the bank, and the customer was at all times at liberty to draw cheques to the extent of the balance in his favour, as appearing on the account thus made out. Interest was allowed by the banker

(o) (1742), Willes, 400.

(p) (1796), 1 Bos. & Pull. 539.

(q) (1858), 2 De G. & J. 194.

upon the bills only from the time when their amount was received. It was held that, in the absence of evidence of the customer's acquiescing in or authorizing the banker's treating the bills as his own from the time of their being paid in, they remained the property of the customer subject to the lien of the banker for his cash balance; that the banker had no right to negotiate them unless the balance of the account was in his favour; and that, on the bankruptcy of the banker, such of them as remained in his hands in specie did not pass to his assignees, but, subject to such lien as above mentioned, belonged to the customer.

Bills of Customer in Hands of Agent Banker.—In *Ex parte Sargeant* (r) the petitioner had paid two bills, which did not fall due till after the bankruptcy, into the bankrupt's bank. The latter remitted them to their London agents, in whose hands they remained at the time of the bankruptcy.

Lord Chancellor Eldon said: "It is quite clear that short bills in the possession of bankers are to be considered as still remaining in the possession of the parties by their agents, to be specifically returned; and if these bills were written short, the petitioner could have compelled Kensington & Co." (the London bankers) "so to settle with Burroughs" (the Salisbury banker) "as not to break in upon his claim. That they were not written short amounts to nothing, unless there be a concurrence manifested at the time, or to be inferred from the habits of dealing between the parties, that they were to be considered as cash. If they were there with the petitioner's knowledge as cash, and he drawing or entitled to draw upon them as having that credit in cash, he would thereby be precluded from recurring to them specifically; but it is upon them to prove that to be the case, and the petitioner is therefore entitled, unless they have been carried to his credit as cash, with his knowledge or consent. Take an inquiry before the Commissioners, and declare the petitioner entitled to the proceeds of the bills, unless by his consent, or from the habit of dealing between the parties, they can be considered as cash" (s).

(r) (1810), 1 Rose, 153.

(s) See also *Ex parte Burton Bank*, and *Ex parte Harford* (1814), 2 Rose,

162; and cf. *Scott v. Surman* (1742), Willes, 400; *Ex parte Pease*, *In the matter of Boldero* (1812), 1 Rose, 232.

In *Ex parte Armitstead* (t) D. had placed two bills of exchange (after indorsing them) in the hands of country bankers. The latter transmitted them to their London correspondents, who were in the habit of assisting them with advances upon remittances of bills and notes. The London bankers discounted one of these two. The account between the customer and the country banker was kept, as in *Thompson v. Giles* (u), according to the custom of the county of Lancaster.

The Lord Chancellor, following that case, held that the country bankers had no right to dispose of the bills in the way in which they had, and that, as the London bankers had a security more than sufficient to cover the balance of their account, the customer was entitled to stand in their situation to the extent to which that balance had been so reduced (x).

Bill sent to be Discounted.—In *Buchanan v. Findlay* (y) A. & Co., merchants at Liverpool, remitted a bill to B. & Co. in London, with directions to get it discounted and apply the proceeds in a particular way. B. & Co. did not get the bill discounted, but received the money when it became due. Before that time A. & Co. had stopped payment, and desired to have the bill returned to them. It was held that B. & Co. were liable to be sued for the amount of the bill by the assignees in bankruptcy of A. & Co., and that B. & Co. could not set off a debt due to them from A. & Co.

“The bills,” said Lord Tenterden, C.J., “were sent to the defendants that they might procure them to be discounted without delay, and make an immediate application of the proceeds according to the directions contained in the letter in which the bills were sent to them. They did not procure them to be discounted, and as soon as the bankrupts knew that this was not done they required the defendants to return the bills. The bankrupts had a right to make this demand. If goods or bills are deposited for a specific object and the bailee will not perform the object, he must return them; the property of the bailor is not divested or transferred until the object is performed” (z).

(t) (1828), 2 Gl. & J. 371.

(u) See p. 462, *supra*.

(x) Cf. *Johnson v. Robarts*, cited at

p. 389, *supra*.

(y) (1829), 9 B. & C. 738.

(z) See also *Naoroji v. Chartered Bank*

Drafts payable on Demand.

In the case of a cheque or other draft payable on demand, it is not quite clear whether the reasoning of the foregoing decisions applies.

Naturally, questions as to these instruments have not arisen so frequently as in the case of undue bills, owing to the comparatively brief space of time which elapses between their delivery to the banker and their collection or dishonour.

In *In re Brown, Ex parte Plitt* (a), J. P., on the 3rd April, 1888, received, on behalf of foreign principals, a cheque for 154*l.* 3*s.* 8*d.*, drawn on an English bank, which on the same day he handed to A. B., a banker, with whom he had no banking account, and received the following receipt:—

“Received of Julius Plitt, Esq., cheque on Joint Stock Bank, Charterhouse Street Branch, for one hundred and fifty-four pounds 3*s.* 8*d.*, for collection.

“For Alexander Brown & Co.
ALEX. BROWN.”

“154*l.* 3*s.* 8*d.*

Brown paid the cheque into his account with Messrs. Barclays, who obtained cash for it. Shortly afterwards Brown paid to Julius Plitt 4*l.* 18*s.* 6*d.*, and on the 13th April a further sum of 19*l.* 5*s.* 10*d.* On the 19th April a receiving order was made against Brown, and he was adjudicated bankrupt and the trustee claimed the balance of the proceeds of the cheque.

In the course of the argument, Cave, J., observed: “Where the debtor is to collect and remit there is confidence and trust. Where the debtor is to use and repay on demand then there is no trust.” And, in giving judgment, the learned judge said: “I am of opinion here that the relation between the parties was not the ordinary relation of banker and customer. Where that relation exists, it follows that the banker can use the money of the customer, and nothing is created but a debt from the banker to the

of India (1868), L. R. 3 C. P. 444 ;
London, Bombay and Mediterranean Bank
v. Narraway (1872), 15 Eq. 93 ; *Astley*
v. Gurney (1869), L. R. 4 C. P. 714 ;
McKinnon v. Armstrong Brothers & Co.

(1877), 2 A. C. 531 ; *Elliott v. Turquand*
(1881), 7 A. C. 79 ; and Part VIII.
Chap. 2.

(a) (1889), 60 L. T. 397 ; 6 Mor. 81.

customer. Here the case is a different one. The applicant, Plitt, says that he handed the cheque to Brown for Brown to receive and hold it for him. If so, it is not the ordinary case of banker and customer."

In *In re Mills, Bawtree & Co., Ex parte Stannard* (b), on the failure of the debtors, who carried on business as bankers in the country, a claim was made by certain customers that they were entitled to have paid in full out of moneys in the hands of the London agents of the debtors three cheques drawn by them upon the debtors' bank in favour of third parties, and also a sum of 1,043*l.*, being the amount of cash and London and country cheques paid in to the London agents of the debtors by the customers to the credit of their current account with the debtors shortly before the receiving order.

It was held that the question depended on whether the moneys in the hands of the London agents of the debtors were held by them specifically appropriated in favour of the customers; and that, unless the debtors, through their London agents, received those sums, not as bankers in the ordinary course, but as the agents of the customers for collection and specific appropriation, the customers could have no claim to the moneys; and, as a matter of fact, the Court was of opinion that there was no ground for holding that any of the sums claimed were specifically appropriated when paid in, or that there was anything in the course of business with the London agents who received the amounts which amounted to an appropriation; and that the claim must therefore be disallowed. It was also held that one test to be applied was to consider whether, if, during the time occupied by the collection of the country cheques paid in, the customer had drawn a cheque on the debtors, and that cheque had been presented for payment at their bank and had been dishonoured at a time when the customer's account was in credit to the extent of the cheque, if the amount of the uncollected country cheques was included, the customer would have had a right of action for such dishonour; and that, on applying that test, the Court had come to the conclusion that, under the circumstances, such right of action would have arisen; and, further,

(b) (1893), 10 Mor. 193.

that the inference of fact drawn by the Court in *Thompson v. Giles (c)*, in respect of short or undue bills, was largely grounded on the bills not being due and the entry in the cash column of the bankers' book being for the full amount of the bill without any deduction for the time which the bill had to run, which negatived the inference that the bankers intended to take the bill; and that the same reasoning had no application to the case of an instrument payable on demand.

In the course of his judgment, Vaughan Williams, J., said: "It was further urged upon me that the inference that the banker took these cheques as his property is negatived, because I ought to assume in this case that the bankers, in case the cheques were dishonoured, would immediately debit the account of the customer with the amounts of the cheques with which they had previously credited him. But the answer to this seems to me to be twofold. First, in all probability the cheques paid in were indorsed by Messrs. Stannard: this would give the bankers the right to debit their customer, even though they originally received the cheques as their property, as a loan to them. Secondly, even if the cheques were not indorsed, the result, in my opinion, would be the same, because I think that, just as a cheque may operate as a conditional payment to be avoided if the cheque is not honoured, so a cheque may operate as a conditional loan, creating a debt by the recipient of the cheque, to be avoided if not honoured. In both cases it seems to me that the property in the cheque would pass to the recipient. Even if this were not so, it seems to me that in Messrs. Stannard's case the property in the cheques did pass, because at the date when the respective cheques were paid in the account of Messrs. Stannard was overdrawn. I am quite aware that, in the case of short bills, the fact that the account was overdrawn at the time of the receipt of them does not necessarily negative the inference that the bills were received for collection, but it seems to me, nevertheless, that in the case of a cheque the fact that the account was overdrawn at the time of its receipt is evidence to show the intention of both parties that the property in the cheque should pass" (*d*).

(c) See p. 462, *supra*.

(d) See also *Clarke v. London and County Banking Co.*, [1897] 1 Q. B. 552; *In*

The view that the position of the banker as to cheques and drafts payable on demand is, as regards the matter under consideration in this chapter, different from his position with regard to bills payable at a date subsequent to their delivery to the banker, was not adopted in *Gaden v. Newfoundland Savings Bank* (*f*). There it was held that a bank, by accepting a deposit of a certified cheque and crediting the depositor with the amount thereof in her pass-book, must be deemed to have accepted it for the purpose of cashing it as the depositor's agent, and could not in the absence of express agreement to that effect be deemed to have acquired title to it in consideration of the credit entry, and thus to have gratuitously guaranteed its payment by the drawee bank.

In delivering the judgment of the Judicial Committee, Sir Henry Strong, after alluding to *Giles v. Perkins* (*g*) and *Thompson v. Giles* (*h*), said: "If, therefore, the case had been the converse of that before their Lordships, and the appellant had been claiming title to the cheque instead of seeking to repudiate it, the authorities above cited, which could be largely added to, would be decisive to show that the cheque had never ceased to be the property of the appellant, and no reason can be suggested why the same conclusion should not be reached in the present case" (*i*).

In this connection, however, *The Capital and Counties Bank v. Gordon* (*k*) must be considered. It would seem that the practice of crediting cheques as cash might be presumed to be known to the customer, and assented to by him, and that, accordingly, in the absence of any circumstances indicating a contrary intention, the property therein, when so credited, would be deemed to pass to the banker at once. But, in view of *Thompson v. Giles* and the other similar cases referred to above, it is perhaps possible to contend that, while crediting a cheque as cash excludes the operation of sect. 82 of the Bills of Exchange Act, nevertheless, as between the banker and his customer, the property in the cheque, until the amount due upon it is collected, remains in the customer.

re Commercial Bank of South Australia (1887), 36 Ch. D. 522.

(*f*) [1899] A. C. 281. See, as to this case, note (*m*), on p. 470, *infra*.

(*g*) See p. 461, *supra*.

(*h*) See p. 462, *supra*.

(*i*) See note (*m*), on p. 470, *infra*.

(*k*) See pp. 147, 148, *supra*.

Powers of Banker.

Where value has at any time been given for a bill, the holder is deemed to be a holder for value as regards the acceptor and all parties to the bill who became parties prior to such time (*l*).

Accordingly, a banker to whom a bill is indorsed for collection has full rights of enforcing payment against all parties except his customer.

“If a cheque is paid to a bank on the footing that the amount may at once be drawn upon, and it is drawn upon accordingly, the bank is a holder for value in due course” (*m*).

But when the holder of a bill indorses it in blank, and gives it to a banker to collect, the former can still maintain an action upon the bill against the acceptor (*n*).

A banker to whom a bill is restrictively indorsed for collection, and who has paid the amount of such bill to the indorser, cannot, by reason of such payment, acquire rights on the bill against the acceptor, where the amount of the bill has been paid to the indorser before maturity.

In *Williams, Deacon & Co. v. Shadbolt* (*o*) a bill drawn upon the defendants by the Dana Company was discounted by the latter with the Bank of Mobile, and indorsed to that bank. The bank indorsed the bill: “Pay to the order of Messrs. Williams, Deacon & Co. for collection per account of the Bank of Mobile.” The plaintiffs presented the bill to the defendants for acceptance, and the defendants accepted it. The plaintiffs thereupon allowed the Bank of Mobile to draw on them for the amount of the bill. Before it matured the Dana Company paid the amount to the Bank of Mobile, and wrote to the defendants releasing them from their liability as acceptors. Subsequently, both the Dana Company and the Bank of Mobile failed. The plaintiffs thereupon

(*l*) Bills of Exchange Act, s. 27 (2).

(*m*) Per Bowen, L. J., in *National Bank v. Silke*, [1891] 1 Q. B. 435, at p. 439; *M'Lean v. Clydesdale Banking Co.* (1883), 9 App. Cas. 95; *Ex parte Richdale*, *In re Palmer* (1882), 19 Ch. D. 409. Cf. *Gaden v. Newfoundland Savings Bank*,

[1899] A. C. 281, where the decision may have turned upon the fact that the respondents were a bank of deposit merely.

(*n*) *Clerk v. Pigot* (1699), 12 Mod. 193.

(*o*) (1885), 1 Cab. & E. 529; 1 T. L. R. 417.

sued the defendants as acceptors, but Mr. Justice Cave held that they could not recover.

Position of Transferee from Banker.—Where indorsed bills of exchange are deposited by a customer with a banker, the latter has the power of disposing of them. In the event of his bankruptcy, though the customer may recover such bills as remain in specie, subject to the banker's lien for the balance of his account, he cannot follow their proceeds if they have been converted (*p*).

So, if A. deposit bills indorsed in blank with B., his banker, to be received when due, and the latter raise money upon them by pledging them with C., another banker, and afterwards become bankrupt, A. is not entitled to recover the bills from C. This arises from the nature of a negotiable instrument, one of the characteristics of which is that a holder may pass a better title to it than he himself has (*q*).

Eyre, C.J., delivering the judgment of the Court in *Collins v. Martin* (*r*), said: "For the purpose of rendering bills of exchange negotiable, the right of property in them passes with the bills. . . . The property passing with the possession, it is admitted that a banker who receives indorsed bills from his customers to be got in when due, and carried to his account, may discount or sell them. Why may he not pledge them? Either is a breach of the confidence reposed in him."

If, however, the transferee takes the bill with notice of the purpose for which it was in the banker's hands, the customer will be entitled to recover the value from him (*s*).

(*p*) *Ex parte Pease and others, In the matter of Boldero* (1812), 1 Rose, 232.

(*q*) *Collins v. Martin* (1797), 1 B. & P. 648; 2 Esp. 520; recognised as an authority by Lord Eldon, C., in *Ex parte Wakefield Bank* (1812), 1 Rose, 243, at p. 246. See also to the same effect a

passage in the judgment of the Court in *Bolton v. Puller* (1796), 1 B. & P. 539, at p. 546.

(*r*) See last note.

(*s*) *Muttyloll Seal v. Dent* (1853), 8 Moo. P. C. 319. See further upon this subject, Part VIII. Chap. 7, Sect. 4.

CHAPTER VIII.

RECEIVING AND ACCOUNTING FOR PAYMENT.

Receiving Payment.

THE receipt of payment through a clearing-house has been already discussed (*a*).

Accepting Cheque in Payment.—"It is believed not to be usual at this day with London bankers to exchange bills for cheques, and it is doubtful whether they would now be protected in so doing" (*b*).

But in *Russell v. Hankey* (*c*) it was held that a banker receiving the acceptor's cheque for the amount of a customer's bill in his hands for collection was not guilty of negligence, and accordingly not liable for the amount on the dishonour of the cheque (*d*).

It is, moreover, a common practice at the present day for a banker to give up documents of title on behalf of a customer on receiving a marked cheque in payment (*e*).

Credit in Account.—If a collecting banker gives credit to the paying banker in the account between them in respect of the draft or note paid in to the former for collection, he will be accountable to his customer as if he had actually received the amount (*f*).

(*a*) See pp. 310—319, *supra*.

(*b*) Byles on Bills, 16th ed. p. 25.
Cf. *Papè v. Westacott*, [1894] 1 Q. B. 272;

Bridges v. Garrett (1870), 5 C. P. 451.

(*e*) (1794), 6 T. R. 12.

(*d*) Cf. *Ridley v. Blackett* (1796), Peake, Add. Cas. 62.

(*e*) See p. 250, *supra*.

(*f*) *Gillard v. Wise* (1826), 5 B. & C. 134.

Documentary Bills.—It is conceived that the following statement (*g*) may be accepted as a guide to the duty of the banker.

“It has been held that where a time draft, drawn by consignors of merchandise upon the consignees, is forwarded to a bank without any special instructions, but having the bills of lading for the merchandise attached, the bank is justified, by reason of the implied intention of the parties and the usages and necessities of business, in surrendering the bills of lading, to the consignees upon their acceptance of the draft, without waiting for them to make final payment of it.

“But a bill of lading accompanying a time draft must be retained by a collecting bank after acceptance of the draft, to secure its payment when the bill of lading is made deliverable to consignor or his order. A bank receiving a sight draft for collection should not surrender the accompanying bill of lading until the draft has been paid.”

“Cash against documents” means that when the documents are tendered the cash must be ready. But a practical meaning must be given to the words, and they do not mean that if the seller walks into the buyer’s office and offers the documents, the buyer will commit a breach of contract if he does not at once tender a cheque. That would not be business. The clause means that the payment against the documents must be made within a reasonable time; *e.g.*, if the buyer says, “You shall have a cheque to-morrow morning,” that will be sufficient. Even a greater delay would not be unreasonable if it would not affect the rights of the parties. No property passes to the buyer until he receives the documents; and to these he is not entitled until payment (*h*).

Instructions as to Free Delivery.—In *Baerlein & Co. v. Chartered Mercantile Bank of India, London and China* (*i*) the defendant bank, who were employed by the consignor of goods to collect the proceeds of bills drawn against such goods, and for that purpose received the

(*g*) Morse on Banks and Banking (Boston), 4th ed. pp. 453-4.

(*h*) Per Kennedy, J., in *Ryan v. Ridley & Co.* (1902), 19 T. L. R. 45.—In *Glen v. Semple* (1901), 3 Fras. Sess. Cas.

1134, it was held that the words “against cheque” appearing upon a cheque had no effect upon its negotiability.

(*i*) (1896), 1 Com. Cas. 366.

shipping documents, were instructed to allow a free delivery of goods to the consignee up to a fixed amount. It was held that the banker was under no obligation to ascertain that the payments made from time to time by the consignee represented the proceeds of any particular goods (*k*).

Position of Banker towards Third Party.—Where a banker to whom a bill of exchange drawn against a bill of lading is sent for presentation and collection, having received a document purporting to be a bill of lading, informs the drawee that he holds the bill of lading against which the bill of exchange is drawn, he is not liable to the latter if the document in question turns out to be a forgery (*l*).

So, “indorsement by a bank ‘for collection’ on invoices that accompany bills of lading attached to drafts creates no responsibility on the part of the bank; it is not a guaranty that the bills of lading are genuine” (*m*). It imports nothing more than that the goods which the bills state to have been shipped are to be held for the payment of the drafts, if the drafts are not paid by the drawees, and that the bank transfers them only for that purpose (*n*).

Conditional Payment.—Where an agent is employed by the holder of a bill to receive payment of it from the acceptor, and receives payment from him clogged with a condition without assent to which the holder is not entitled to retain the money paid, the agent is not entitled to treat such conditional payment as if it were an absolute payment, and to cancel the bill as paid before he has received the assent to the condition.

In *The Bank of Scotland v. Dominion Bank (Toronto)* (*o*) the agent of a bank offered to try to obtain payment of a bill which had been protested for non-payment, and the holders accepted the offer. The acceptors offered to pay the bill and the protest charges on the condition that they should not be called upon to

(*k*) Cf. *Borthwick v. Bank of New Zealand* (1900), 6 Com. Cas. 1, cited in Part VII. Chap. 3.

(*l*) *Leather v. Simpson*, cited at p. 417, *supra*.

(*m*) Morse on Banks and Banking (American), 4th ed. p. 454.

(*n*) *Goetz v. Bank of Kansas City* (1887), 7 Sup. Ct. Rep. 318, cited in Morse on Banks and Banking, 4th ed. at p. 454.

(*o*) [1891] A. C. 592.

pay interest and expenses. The bank's agent communicated this condition to the holders, and without waiting for authority took payment of the bill and protest charges, marked the bill paid, and delivered it to the acceptors, who deleted their names thereon. Thereafter the holders intimated their refusal to agree to the conditions on which payment had been made, refused to accept the sum tendered to them by the agent of the bank, and received back the bill cancelled. They then brought an action against the acceptors for the amount of the bill, with interest, and for the expenses of the action, and obtained a decree, but the acceptors became bankrupt. The holders thereupon brought an action against the bank for the amount of the bill, with interest, and for the expenses of their action against the acceptors. It was held that the bank was liable, but was entitled to an assignation of the rights of the holders against the drawers of the bill.

"The ground upon which I base my judgment in the case," said Lord Herschell, "is this, that where a banker is employed to receive payment of a bill from the acceptor, and receives payment from him clogged with a condition without assent to which the holder is not entitled to retain the money paid, I think the banker cannot be entitled to treat such conditional payment as if it were an absolute payment, and to cancel the bill as paid before he has received the assent to the condition. It seems to me that where he has transmitted the money to his principal upon the distinct terms that the principal cannot be justified in keeping it absolutely and in all events, but can only keep it properly if he assents to a condition imposed by the letter remitting it, then he was bound to hold in his own hands the acceptance sent him for collection untouched and untampered with, until he had ascertained whether his principal was willing to assent to the condition or not. Not having done so in this case, it seems to me that he has committed a breach of duty from which the damage sued for has resulted."

Responsibility for Agents and Correspondents.—The banker is liable to account to his customer for the proceeds of a draft collected by an agent or correspondent employed by the banker (*p*).

Receipts.

The Stamp Act, 1891, imposes a duty of 1*d.* on a receipt given for, or upon the payment of, money amounting to 2*l.* or upwards.

The Act defines "receipt" as follows:—

101.—(1.) For the purposes of this Act the expression "receipt" includes any note, memorandum, or writing whereby any money amounting to two pounds or upwards, or any bill of exchange or promissory note for money amounting to two pounds or upwards, is acknowledged or expressed to have been received or deposited or paid, or whereby any debt or demand, or any part of a debt or demand, of the amount of two pounds or upwards, is acknowledged to have been settled, satisfied, or discharged, or which signifies or imports any such acknowledgment, and whether the same is or is not signed with the name of any person.

(2.) The duty upon a receipt may be denoted by an adhesive stamp, which is to be cancelled by the person by whom the receipt is given before he delivers it out of his hands.

The comprehensive character of this definition is illustrated by the case of *Attorney-General v. Carlton Bank (q)*. There a solicitor was employed by the defendants, who carried on the business principally of money-lenders, under an agreement whereby he was appointed an officer of the bank upon the terms that he was to be paid a salary and to be provided with an office, stationery, and staff of clerks, and was to devote his whole time to the conduct of the legal business of the bank. The solicitor from time to time sued for and recovered sums of money due to the bank. As each sum was recovered he entered the amount in an account-book, and then, in accordance with his duty, handed over the money to the secretary or cashier of the bank, who wrote against the entry in the account-book his initials and the date on which the money was handed over to him, in some instances adding the word "received." The account-book was the property of the solicitor, and remained in his possession. It was held that, as the initialling of the entries in the account-book, whether with the addition of the word "received" or not, was intended as an acquittance of the

(q) [1899] 2 Q. B. 158.

solicitor in respect of the money handed over by him, the entries so initialled constituted "receipts" within sect. 101 of the Stamp Act, 1891, and required to be stamped, none the less because the solicitor was a servant of the bank on whose behalf he had received the money, and the acknowledgment of the receipt of the money from him was given by a fellow-servant.

Exemptions.—Among the receipts and acknowledgments exempt from stamp duty are the following :—

- (a) The name of a banker, whether accompanied by words of receipt or not, written in the ordinary course of his business as a banker upon a bill of exchange or promissory note duly stamped (*r*).
- (b) The name of the payee written upon a draft or order, if payable to order (*r*).
- (c) Receipt given for money deposited in any bank, or with any banker, to be accounted for and expressed to be received of the person to whom the same is to be accounted for (*s*).
- (d) Acknowledgment by any banker of the receipt of any bill of exchange or promissory note for the purpose of being presented for acceptance or payment (*t*).
- (e) Receipt given for any principal money or interest due on an exchequer bill (*u*).
- (f) Receipt given upon any bill or note of the Bank of England or the Bank of Ireland (*x*).
- (g) Receipt given for the consideration money for the purchase of any share in any of the Government or Parliamentary stocks or funds, or in the stocks and funds of the Secretary of State in Council of India, or of the Bank of England, or of the Bank of Ireland, or for any dividend paid on any share of the said stocks or funds respectively (*y*).
- (h) Receipt indorsed or otherwise written upon, or contained in any instrument liable to stamp duty, and duly stamped,

(*r*) Finance Act, 1895 (58 & 59 Vict. c. 16), s. 9.

(*s*) Stamp Act, 1891 (54 & 55 Vict. c. 39), Schedule I., "Receipt"—Exemption (1).

(*t*) *Ibid.* Exemption (2).

(*u*) *Ibid.* Exemption (7).

(*x*) *Ibid.* Exemption (9).

(*y*) *Ibid.* Exemption (10).

acknowledging the receipt of the consideration money therein expressed, or the receipt of any principal money, interest, or annuity thereby secured or therein mentioned (z).

In the case of a scrip certificate, duly stamped, which states that the bearer is entitled to a certain amount of stock after payment of several sums at specified dates, receipts indorsed on the certificate applicable to the payment of the instalments are exempt from stamp duty under the last-mentioned of the above exemptions, as they acknowledge the receipt of the consideration money expressed in the certificate on which they are indorsed (a).

Stamping after Execution.—The Stamp Act, 1891, provides—

102. A receipt given without being stamped may be stamped with an impressed stamp upon the terms following; that is to say,

- (1.) Within fourteen days after it has been given, on payment of the duty and a penalty of five pounds;
- (2.) After fourteen days, but within one month, after it has been given, on payment of the duty and a penalty of ten pounds;

and shall not in any other case be stamped with an impressed stamp.

Penalty. 103. If any person—

- (1.) Gives a receipt liable to duty and not duly stamped; or
- (2.) In any case where a receipt would be liable to duty refuses to give a receipt duly stamped; or
- (3.) Upon a payment to the amount of two pounds or upwards gives a receipt for a sum not amounting to two pounds or separates or divides the amount paid with intent to evade the duty;

he shall incur a fine of ten pounds.

The Funds Received.

Collection in the Ordinary Course.—Generally speaking, the express or implied instructions of the customer authorize the banker to place the proceeds of a draft sent for collection to his account.

(z) Stamp Act, 1891 (54 & 55 Vict. c. 39), Schedule I., "Receipt"—Exemption (11).—For other exemptions see *ibid.*; and the Revenue Act, 1898 (61 & 62

Vict. c. 46), s. 8.

(a) *London and Westminster Bank v. Inland Revenue Commissioners*, [1900] 1 Q. B. 166.

In this case the result is the same as when cash is paid in by the customer. He ceases to have any proprietary rights in respect of the moneys received by the banker, and the latter becomes his debtor for the amount, unless the balance prior to the receipt of the proceeds of the draft was against the customer, in which case the banker must give him credit in the account between them (*b*).

Collection under Special Authority.—It will be otherwise if he is employed in a fiduciary capacity, as if he is specially authorized to collect a specific draft upon the understanding that the proceeds are to be paid over directly to the party instructing him, and not to be placed to his credit in account.

In *In re West of England and South Wales District Bank, Ex parte Dale & Co.* (*c*), Dale & Co., who were bankers at South Shields, were in the habit of employing the West of England and South Wales District Bank, with whom they had no account, as special agents to collect for them. On the 5th December, 1878, Dale & Co., having eight sums of money to receive at Cardiff on average orders, sent the orders to the Cardiff branch of the West of England Bank, with directions to collect the money and pay it when received to the account of Dale & Co. with Glyn & Co., of London, who were agents for both the banks. The West of England Bank collected the sums due on six of the average orders, partly in the form of a cheque on another bank, and partly in cash, and on the 7th wrote to Dale & Co. that the amount had been remitted to Glyn & Co. This, however, had not in fact been done, and the West of England Bank ceased to carry on business after the 7th of December, and on the 9th (the 8th being Sunday) went into liquidation. The cheque was given up by the liquidators to Dale & Co., but with regard to the cash the question was submitted to the Court, whether it was part of the general assets of the bank or should be paid over to Dale & Co. in priority to the general creditors. Fry, J., decided against Dale & Co.; but it is clear from the judgments of Jessel, M. R., and Baggallay, L. J., in *In re Hallett's Estate, Knatchbull v. Hallett* (*d*), and from the

(*b*) See Part II. Chap. 2.
(*c*) (1879), 11 Ch. D. 772.

(*d*) (1879), 13 Ch. D. 696, cited at p. 176, *supra*.

decision there arrived at, that, in similar circumstances, the decision would now be otherwise (e).

Crediting the Customer's Account.—This subject is dealt with above at pages 143—148.

Crediting Amount of Draft by Mistake.—In *Deutsche Bank (London Agency) v. Beriro & Co. (f)*, B., the indorsee of a bill of exchange, forwarded it to the defendants for collection. The defendants handed the bill to the plaintiffs, and the plaintiffs forwarded it to their agents for the same purpose. The plaintiffs, wrongly assuming that the bill had been paid, informed the defendants that the bill had been collected, and gave them a cheque for the amount of the bill. The defendants informed B. that the bill had been met, and credited him with the amount, which he accordingly spent. The bill, in fact, had been dishonoured. It was held that, B. having been credited with the amount and having paid it away, plaintiffs were estopped from recovering (g).

(e) See also *Ex parte Riddell* (1842), 3 M. D. & De G. 80 ; 7 Jur. 21 ; 12 L. J. Bank. 19.

(f) (1895), 1 Com. Cas. 255.

(g) Cf. pp. 197—200, *supra*.

CHAPTER IX.

DEFECT IN CUSTOMER'S TITLE.

CONVERSION consists in the wrongful intermeddling with the goods of another for the purpose of taking them away from the party entitled to them, or of exercising some dominion or control over them for the benefit of some one other than the party entitled. To render a person liable to an action for damages for conversion, it is not necessary to show any improper intention on his part.

Banker's Liability to the true Owner.

Accordingly, if a banker deals in the ordinary course of business with a draft entrusted to him by a customer who is not entitled to it and cannot pass any title to the banker (the instrument not being negotiable and duly negotiated), he will render himself liable to the true owner (subject to what is said below as to crossed cheques) either in damages for conversion, or for the amount of the proceeds actually received by the banker, as the true owner may elect (a).

In order to render the banker liable in such a case it is not necessary to show that he made any profit by the transaction (b).

In *Arnold v. The Cheque Bank* (c) the plaintiffs, merchants at New York, desiring to transmit 1,000*l.* to W. & Co., of Bradford, purchased of S. & Co., in New York, a draft for that amount drawn by S. & Co. on Smith, Payne & Co., London, payable to the

(a) Per Lord Lindley in *Capital and Counties Bank v. Gordon*, [1903] A. C. 240, at p. 247; and see authorities cited on pp. 483, 484, *infra*.

(b) Per Cave, J., in *Kleinwort, Sons &*

H.

Co. v. Comptoir National d'Escompte de Paris, [1894] 2 Q. B. 157, at p. 158; and per Collins, J., in *Lacave & Co. v. Crédit Lyonnais*, [1897] 1 Q. B. 148, at p. 158.

(c) (1876), 1 C. P. D. 578.

order of the plaintiffs on demand. The plaintiffs indorsed the draft specially to W. & Co. or order, and inclosed it in a letter addressed to them, which was placed in a letter-box in their office to be posted in the usual way. The letter was stolen by one Hecht, a clerk in the employ of the plaintiffs, who forged an indorsement of W. & Co., and procured the defendants, bankers in London, to present the draft and obtain the money, which was placed by them to the account of a person acting in concert with Hecht, upon whose cheques the money was almost immediately drawn out. In an action for money had and received, the defendants, in order to show that the negligence of the plaintiffs in the custody and transmission of the draft afforded facilities for the fraud, and so estopped them from suing for the money, tendered evidence that it was an usual and almost invariable practice amongst merchants sending large remittances from abroad to send, besides the letter containing the remittance, a letter of advice by the same or the next mail. This evidence was rejected, on the ground that the alleged negligence was collateral only to the transaction giving rise to the action. It was held that the plaintiffs' right to the draft, and to sue for the proceeds thereof in the hands of the defendants as money received to their use, was not affected by the felonious act of Hecht; and that the evidence tendered was properly rejected.

In delivering the judgment of the Court, Lord Coleridge, C. J., said: "As regards the first question, it is clear that the property in the draft had never in fact passed out of the plaintiffs; for indorsement consists not merely of the written indorsement on the draft, but there must also be a delivery with intention to transfer the property: *Marston v. Allen* (*d*). In this case there was no delivery of the draft to the indorsee, and therefore, unless the plaintiffs are estopped from setting up as against the defendants the forgery of the indorsement of Williams & Co., the bill remained their property when it reached the hands of the defendants, and they are entitled to the draft, for the statute 16 & 17 Vict. c. 59, s. 19, only protects Messrs. Smith, Payne & Co., the drawees (*Ogden v. Benas* (*e*)), from the consequences of paying

(*d*) (1841), 8 M. & W. 494.

(*e*) (1874), L. R. 9 C. P. 513.

the draft on a forged indorsement, and affords no protection to the defendants. But it was argued that the money received by the defendants could not be regarded as money received to the use of the plaintiffs, because the defendants had been guilty of nothing like a conversion, but had acted as a mere conduit to receive and hand over the amount of the draft to their customer, Mrs. Chandler. In the case of goods, if a man takes and sells them when he has no right, the owners may waive the tort and recover the proceeds in an action for money had and received: *Lamine v. Dorrell* (*f*); *Neate v. Harding* (*g*); and see *Hollins v. Fowler* (*h*): and equally, as was admitted by the defendants, if a person wrongfully convert a bill of exchange and receive the amount, the owner of the bill may either sue in tort or may waive the tort and recover the money as received to his use. The question here is, whether what was done by the defendants amounted to a conversion of the bill; and we are of opinion that it did. Payment of the draft was actually obtained by the defendants from Smith, Payne & Smith; and the next step in dealing with the money was not simply to hand it over to Mrs. Chandler, but to retain it and open an account with her, the effect of which was to appropriate it to their own use as a loan from Mrs. Chandler: see *Polt v. Clegg* (*i*). Under these circumstances, there was nothing in the transaction at all analogous to a mere packing by a packer, or carriage by a carrier, of goods intrusted to them by a person having no title: *Greenway v. Fisher* (*k*); and see *Hardman v. Booth* (*l*): nor is the employment of banker a public employment which he is in any way bound to exercise. The defendants were at liberty to take the bill or not as they chose. They took it, and received the amount. The evidence also was that the defendants made use of their customers' money by lending it at interest; so that, although no interest or commission was charged on the account, they nevertheless derived benefit from the transaction. We are of opinion, therefore, as the property in the bill remained in the plaintiffs, that

(*f*) (1706), 2 Ld. Raym. 1216.

(*g*) (1851), 6 Ex. 349.

(*h*) (1874), L. R. 7 E. & I. A. 757;
44 L. J. Q. B. 169; 33 L. T. 73.

(*i*) (1847), 16 M. & W. 321.

(*k*) (1824), 1 C. & P. 190.

(*l*) (1863), 1 H. & C. 803; 32 L. J.
Ex. 105; 9 Jur. N. S. 81; 7 L. T. 738;
followed in *Hollins v. Fowler* (1874),
L. R. 7 E. & I. A. 757; 44 L. J. Q. B.
169; 33 L. T. 73.

the money was received by the defendants, under a mistake, it is true, but tortiously as against the plaintiffs, and that, subject to the question whether the plaintiffs have by their conduct disentitled themselves to sue, they may waive the tort and recover the proceeds as money received to their use."

If a cheque drawn on a bank in London is presented at its branch in Paris by a thief who has forged the indorsement of the payee and paid there, and afterwards sent to the bank in London, who credit the Paris branch with the amount, the bank is guilty of a conversion in England (*m*).

In *Patent Safety Gun Cotton Company v. Wilson* (*n*), which was an action for conversion of a cheque payable to the plaintiffs' order and stolen from them, and upon which their name had been forged before it came into the defendant's possession, it was held that it was no defence to plead that the plaintiffs knowingly employed as clerk a man who had been convicted of embezzlement, and was a notorious thief; that he was allowed access to the rooms where the plaintiffs' letters and cheques were kept, and was empowered and permitted to receive and open the said letters and cheques, and to witness the mode in which the plaintiffs indorsed their cheques; that he was frequently paid his wages by the duly indorsed cheques of the plaintiffs, and sometimes employed by the plaintiffs to indorse cheques payable to their order; that the cheque in question was taken or stolen by the clerk, who thereupon forged the indorsement, and then procured one E., who had no notice of the forgery and theft, to cash the cheque; that the defendant received the same, with other cheques from E., without notice of the forgery and theft, and in the ordinary course of business gave full value therefor; that, by their carelessness and wilful neglect in dealing with their letters and cheques, the plaintiffs did not discover the forgery and theft for a considerable time; and after such discovery did not take any steps to prevent the negotiation of the cheque, and by such carelessness and neglect caused the defendant to become a *bonâ fide* holder for value of the cheque without notice of the forgery and theft.

(*m*) *Lacave & Co. v. Crédit Lyonnais*, [1897] 1 Q. B. 148; following *Kleinwort, Sons & Co. v. Comptoir National*

d'Escompte de Paris, [1894] 2 Q. B. 157.

(*n*) (1880), 49 L. J. C. P. 713.

In the course of his judgment in the Court of Appeal, Brett, L. J., said: "There can be no negligence without neglect of some duty; there was no duty here—no relation between the plaintiffs and defendant which could cause any duty to exist from the plaintiffs to the defendant" (o).

Post Office Orders.—In *The Fine Art Society v. Union Bank of London* (p) the plaintiffs banked with the defendants. It was the duty of the plaintiffs' secretary to pay all moneys received by him on behalf of the plaintiffs into the defendants' bank to the credit of the plaintiffs. The secretary, without the knowledge of the plaintiffs, kept an account at the defendants' bank. He paid into the defendants' bank to his own credit certain post office orders belonging to the plaintiffs which the defendants subsequently cashed. The Post Office regulations with regard to post office orders provide that, when presented for payment by a banker, they shall be payable without the signature by the payee of the receipt contained in the order, provided the name of the banker presenting the order is written or stamped upon it. It was held that there had been a wrongful conversion of the post office orders above mentioned by the defendants; and that the regulations of the Post Office with regard to the payment of post office orders presented through bankers did not give to those instruments in the hands of bankers the character of instruments transferable to bearer by delivery so as to bring the case within the doctrine of *Goodwin v. Roberts* (q), and thus give the defendants a good title to the post office orders independently of the authority given to the plaintiffs' secretary.

Lord Justice Fry, in delivering the judgment of himself and Lord Justice Bowen, said: "We are of opinion that, when Mugford handed a post office order across the counter of the bank with a direction to the defendants to take it and to receive the money for it and to carry that money to the credit of his account, and when the bank clerk so took the post office order, the bank converted it; for, to use the language of Lord Ellenborough in *M'Combie v. Davies* (r), 'a man is guilty of conversion who takes my property by assignment from another who has no authority to

(o) Cf. pp. 261, 371, *supra*.
(p) (1886), 17 Q. B. D. 705.

(q) (1876), 1 A. C. 476.
(r) (1805), 6 East, 538, at p. 540.

dispose of it; for what is that but assisting that other in carrying his wrongful act into effect?' It is said, indeed, that in the present case Mugford had authority to dispose of the post office orders by handing them over to this very bank. But the answer is that his authority was only to hand them to the bank with directions to receive the money on account of the plaintiffs, and that consequently the act of Mugford in handing them to the bank with the directions which he gave was an act as wholly unauthorized as if he had no authority whatever to dispose of them. But we are further of opinion that the act of the bank in receiving the money from the post office and treating the same as the money of Mugford was a wrongful application of the money by the bank. The point which thus arises arose for decision in the case of *Arnold v. Cheque Bank* (s), and we see no reason to differ from the conclusion arrived at in that case."

A banker, however, who collects for a customer a post office order, or any document purporting to be such an order, is protected from liability in case of forgery by the Post Office (Money Orders) Act, 1880 (43 & 44 Vict. c. 33), s. 3.

Voidable Transaction.—But a draft given in respect of a voidable transaction can be effectually negotiated to the banker if he takes it in good faith. Thus, in *Tate v. Wilts and Dorset Bank* (t), the plaintiff had forwarded a crossed cheque for 25*l.* payable to the order of George Dixon in part payment for scrap iron to one Laidman, whose name, however, the plaintiff understood to be Dixon. Laidman took the cheque to the defendants and requested them to cash it, stating that his real name was George Ernest Laidman, but that he traded as a scrap and general merchant under the name of "George Dixon," and that he was the payee of the cheque. The cashier told him that he could not cash the cheque for him. Laidman then asked him to collect it, and said he should probably open an account with the 25*l.* The defendants arranged to collect the cheque. In answer to a telegraphic inquiry the defendants were informed by the bank upon which the cheque was drawn that the cheque had been paid. They thereupon placed the 25*l.* to Laidman's account, and he at

(s) See p. 481, *supra*.

(t) (1899), *Journal of the Institute of Bankers*, Vol. XX. p. 376.

once drew a cheque against it. The account was kept open for a period of between two and three months, when the defendants requested Laidman to close it. No scrap iron was ever delivered by Laidman to the plaintiff, and it was afterwards ascertained that he had already been convicted for obtaining money by false pretences, and that he did not actually carry on any trade. Having ascertained this, the plaintiff sued to recover the 25*l.* from the defendants.

Darling and Channell, JJ., decided that the defendants were not liable. They held that the cheque was given in respect of a voidable, and not a void, contract; that the bankers were the holders of the cheque and got payment of it in the regular way; that there was accordingly a fresh disposition of the cheque, and that thereafter the transaction could not be avoided so as to make the bank liable; and that, even if it were not so, and they merely collected the money as agents for their principal, they paid it over to their principal without notice of any fraud, and, therefore, were not liable upon the principle of *Holland v. Russell* (u).

Collection of Crossed Cheques.

The Bills of Exchange Act provides—

82. Where a banker in good faith and without negligence receives payment for a customer of a cheque crossed generally or specially to himself, and the customer has no title or a defective title thereto, the banker shall not incur any liability to the true owner of the cheque by reason only of having received such payment.

This section only applies to cheques which are crossed before they come into the banker's possession. The banker cannot, by afterwards crossing a cheque himself, become entitled to the protection given by the section (x).

As to good faith, no difficulty seems likely to arise in this connection (y).

Accordingly, in considering the scope of the protection of the Act, it will be sufficient to consider (1) Negligence on the part of the banker; (2) Who is a customer; (3) What is receipt for a customer.

(u) (1861), 1 B. & S. 424; (1863), 4 B. & S. 14. See also *Rothschild v. Corney* (1829), 9 B. & C. 388.

(x) *Capital and Counties Bank v. Gordon*, [1903] A. C. 240.

(y) See Bills of Exchange Act, s. 90.

Negligence of Banker.

It will be seen from the following cases that the banker may easily be guilty of such negligence as will exclude him from the protection of the section.

In *Bissell v. Fox* (z) the plaintiffs employed a traveller, who was to remit all cash, bills and cheques to the plaintiffs every week. The traveller afterwards opened an account at the defendants' bank, and paid in to this account, without the sanction or knowledge of the plaintiffs, seven cheques received by him on account of the plaintiffs and payable to the plaintiffs or order. These cheques were indorsed by the traveller "*per pro* J. G. Bissell & Co., II. Shakeshaft," without authority. The defendants, without inquiry as to the traveller's authority to indorse, and with knowledge of his position, received the cheques as cash, and placed them at once to the traveller's credit. Six of these cheques were drawn on bankers other than the defendants, three of them being crossed "& Co." when received by them, and three being uncrossed. These six cheques were crossed by the defendants with the name of their London agents for collection. The seventh cheque was drawn upon the defendants themselves, and was not crossed. The traveller afterwards absconded with the proceeds of these cheques. It was held, in an action by the plaintiffs to recover the proceeds of these seven cheques, that the defendants were not protected by sect. 82 of the Bills of Exchange Act, because, as regards the six cheques not drawn on the defendants, they had not received payment "without negligence"; but that, as regards the cheque drawn on the defendants themselves, they were protected by the Stamp Act, 1853, s. 19, because they had paid the cheque within the meaning of that section.

In *Hannan's Lake View Central, Limited v. Armstrong & Co.* (a) one Montgomery, the plaintiff company's secretary, and a customer of the defendants, paid into his private account a cheque for 542l., drawn in favour of the plaintiff company or order by the British Australian Mines Agency, Limited, under the hand of two of that

(z) (1885), 53 L. T. 193; cited by Collins, M. R., in *Gordon v. London City and Midland Bank*, [1902] 1 K. B. 242;

[1903] A. C. 240, cited at p. 495, *infra*.

(a) (1900), 16 T. L. R. 236; 5 Com. Cas. 188.

company's directors and Montgomery himself, who was then secretary of that company as well as of the plaintiff company. It was crossed generally, and bore the indorsement, "Hannan's Lake View Central, Limited, H. Montgomery, Secretary," the name being in Montgomery's handwriting, and the other words being stamped or type-written by him. The defendants credited him with the amount, and, through their agents, collected the proceeds of the cheque from the London and County Bank, on which it was drawn, and the amount so credited was drawn out by Montgomery for his own purposes. The plaintiff company claimed the amount from the defendants.

Mr. Justice Kennedy found, upon the evidence, that Montgomery acted dishonestly and without authority in indorsing the cheque, and so misappropriated and converted the property of the plaintiff company. His Lordship held that, for the purpose only of paying cheques in to the account of the company at the City Bank, the company could not be allowed, in view of the fact that they had permitted him to indorse cheques for that purpose, to deny his authority to indorse; but that the cheque having been indorsed without authority for another purpose, the defendants, by dealing with the cheque as they had done, had made themselves liable, unless they were protected by sect. 82 of the Bills of Exchange Act. The learned judge further held that they were not so protected, as they had not acted "without negligence" (c): seeing that they knew the company had a banking account of their own at another London bank; and it was apparent, from the transaction, that Montgomery was using for himself a valuable document, which was, upon its face, created for the benefit of his employers and was their property, and the defendants had not had any similar transaction with Montgomery before, though he had paid in cheques in his favour drawn by the plaintiff company.

Bavins, junr., and Sims v. London and South Western Bank (b) was an action brought to recover a sum of 69*l.* 7*s.*, as damages for the conversion of a certain order in writing, the property of the plaintiffs, or, in the alternative, as money received for the plaintiffs' use. The Great Northern Railway Company gave to the

(b) [1900] 1 Q. B. 270.

(c) *I.e.*, in his Lordship's view, "with-

out want of reasonable care in reference to the interests of the true owner."

plaintiffs, in respect of money owing to them for work done for the company, a document which was as follows: "The Great Northern Railway Company. No. 1 Accountant's drawing account. London, July 7, 1898. The Union Bank of London, Limited, No. 2, Princes Street, Mansion House, E.C. Pay to J. Bavins, Junr., and Sims the sum of Sixty-nine Pounds 7s. Provided the receipt form at foot hereof is duly signed, stamped, and dated. £69 7." Then followed the signatures of the secretary and assistant accountant of the Great Northern Railway Company. The order was crossed generally. The receipt form at the foot was as follows: "Received from the Great Northern Railway Company the above-named sum as per particulars furnished. This receipt is not to be detached from the cheque. Signature ——. Dated — 189—." This document was stolen from the plaintiffs, the receipt being then unsigned. On July 15, 1898, the husband of a customer of the defendants, who had often before paid in cheques to his wife's account, came to the defendants' Shoreditch branch accompanied by a man who was unidentified. He handed the before-mentioned order to a clerk of the defendants there to be placed to the account of his wife. It then bore an indorsement which had not been made by or by the authority of the plaintiffs. This indorsement was not very legible, but the Court of Appeal, upon production of the document, were of opinion that the indorsement purported to be that of J. Bavins, Trench and Sims, and certainly not that of J. Bavins, junr., and Sims. The clerk called attention to the fact that the receipt form at the foot of the document was not filled in or signed. A few moments after the document was again handed to the clerk with the receipt form filled in and signed with a signature corresponding with the indorsement. There was no direct evidence by whom the receipt was so signed, but it was not done with the authority of the plaintiffs. The clerk then received the order, and the defendants subsequently credited the customer with the amount specified in it. The order was the next day presented by the defendants to the Union Bank and paid by them. It did not appear that the defendants' customer or her husband knew that the order had been stolen. On August 13 the defendants received a letter from the plaintiffs' solicitor stating that the document had

been stolen from the plaintiffs, and claiming the money which had been paid to the defendants upon it. It appeared that between July 15 and August 13 the customer's account had been operated upon by drawings out and payments in to amounts exceeding 69*l.* 7*s.*; but there had been no settlement of account between the defendants and the customer to prevent the defendants debiting the customer with the amount credited to her as aforesaid.

Mr. Justice Kennedy held that the defendants were not protected by sect. 82 of the Bills of Exchange Act, because the document in question was not a cheque within the meaning of that Act, the amount therein mentioned being only payable on condition that the receipt was signed. The Court of Appeal, before whom sect. 17 of the Revenue Act, 1883, was relied upon as extending the provisions of sect. 82 of the Bills of Exchange Act to such a document, did not decide this point (*c*), as they were of opinion that there had been negligence on the part of the defendants in receiving the document with the indorsement and the receipt signed in a name other than that of the payees, and therefore it became unnecessary to decide the question as to whether the document was a cheque. The Court held, accordingly, that the plaintiffs were entitled to recover the amount received by the defendants upon the order as money received for the plaintiffs' use (*d*).

Meaning of "Customer."

To make a person a "customer" of a bank within the meaning of sect. 82 of the Bills of Exchange Act, 1882, there must be some sort of account, either a current or a deposit account, or something similar (*e*).

In *Great Western Railway v. London and County Banking Co.* (*f*) II. having, by false pretences, obtained from the appellants a cheque crossed "& Co." and marked "not negotiable," took it to the respondent bank. The bank at his request paid part of the

(*c*) See, as to this, p. 212, *supra*.

(*d*) See also *Turner v. London and Provincial Bank* (1903), *Journal of the Institute of Bankers*, Vol. XXIV. p. 220.

(*e*) It is conceived that a person who

has an account at a branch is a customer, not only of the branch, but of the bank as a whole within the meaning of the section.

(*f*) [1901] A. C. 414.

amount of the cheque into the account of one of their customers, and handed the balance to H. After the respondents had received payment of the cheque from the bank on which it was drawn, H.'s fraud was discovered, and the appellants sued the respondents for the amount. It was found as a fact that the respondents received the payment in good faith and without negligence. They had for years been in the habit of cashing cheques for H. in a similar manner. He had no account or pass-book with them. It was held that H. was not a "customer" of the respondents, and that they did not receive payment of the cheque for him within the meaning of sect. 82 of the Bills of Exchange Act, 1882, and were not protected by that section; that H. having no title to the cheque, the respondents took no title to it or to the money, and that they were liable to the appellants for the amount of the cheque.

Lord Davey, in the course of his judgment, said (g): "In all the instances which were put in evidence from the books of the respondents the transaction was similar to the one in question, namely, a payment to the credit of a customer of the respondents by means of a large cheque, out of which Huggins received the change. He was asked the question in cross-examination whether he ever cashed cheques with the respondents except when he had to make a payment out of the rate to the credit of one of their customers. Unfortunately a discussion arose, and the question was never answered. It is not shown that he did so, and I doubt whether he ever did. But be this as it may, I do not think that the relation of customer and banker was ever established between him and the respondents. It is true that there is no definition of customer in the Act, but it is a well-known expression, and I think that there must be some sort of account, either a deposit or a current account or some similar relation, to make a man a customer of a banker. On the facts proved in this case, I do not think the respondents undertook any duty towards Huggins. They took the cheque he offered in payment of a sum to be placed to the credit of their customers and gave him the change, or in some cases (though it is not proved) they may have bought his cheque possibly for their own convenience in remitting to the

head office. But this will not, in my opinion, prove that Huggins was a customer, or that they undertook to collect the cheques on his behalf so as to bring them within the protection of sect. 82."

Lord Brampton dealt with the contention that Huggins was a customer of the bank as follows (*h*): "Huggins had no banking account at all anywhere. It is not necessary to say that the keeping of an ordinary banking account is essential to constitute a person a customer of a bank, for if it were shown that the cheques were habitually lodged with a bank for presentation on behalf of the person lodging them, and that when honoured the amount was credited and paid out to such person, whether with or without any profit to the bank for so presenting them, I would not say that such transactions might not constitute such person a customer within the meaning of the 82nd section; indeed, I think they would. But as between Huggins and the Wantage branch of the respondents' bank the transactions amounted to nothing of the sort. It is true that for many years the branch bank manager had been in the habit of accommodating Huggins by cashing cheques made payable to him, some crossed and some not crossed, but none marked 'not negotiable.' All the cheques were cashed across the counter before presentation. Sometimes a portion of the amount was paid by Huggins' direction into the credit of the account kept with the bank by the Wantage Rural District Council, but there was never a cheque so changed without Huggins getting some cash out of it, and upon no occasion was a cheque paid in to the credit of the Wantage account above mentioned for presentation on their account; and I can well understand why it was so, because once paid in it could not have been got out without a cheque of the Wantage Rural District Council."

"I cannot think," said Lord Lindley, "that Huggins was in any sense a customer of the bank; no doubt he was known at the bank as a person accustomed to come and get cheques cashed, but he had no account of any sort with the bank. Nothing was put to his debit or credit in any book or paper kept by the bank. The entry in the waste-book, p. 20, is only a memorandum of the transaction" (*i*).

(*h*) At pp. 422-23.

(*i*) See also *Matthews v. Williams*,

Brown & Co. (1894), 63 L. J. Q. B. 494;
10 T. L. R. 386; 10 R. 210; where

Receipt for a Customer.

A banker is only protected when he receives payment of a cheque already crossed as agent for collection for a customer.

If he receives payment as a holder of the cheque on his own account he is not protected.

Accordingly, if he gives cash in exchange for the cheque or credits a customer with the amount of the cheque as soon as it is handed in to his account, and allows him to draw against the amount so credited, before the cheque is cleared, he is not protected.

Cashing before Collection.—In the case of *Great Western Railway v. London and County Banking Co.*, which has been already cited (*k*), Lord Halsbury said (*l*): “The 82nd section, which contemplates the receipt of such a cheque received in the ordinary course of business for a customer of the bank, seems to me to contemplate a totally different class of transaction from what is disclosed in this case. The bank thought proper to take this cheque as representing its face value, and if Huggins had no title, as he certainly had not, there is nothing in the 82nd section which will entitle them to treat it as receiving payment for a customer. It is not true to say that the banker is here sought to be made liable by reason of his having received payment for a customer.”

“In the case before your lordships,” said Lord Brampton (*m*), “on every occasion of cheques so cashed the money had already been given to Huggins in exchange for the cheque, the money paid to the respondents has been received on their own account to reimburse them, and not on account of Huggins at all.”

Lord Lindley added (*n*): “It is plain to me that the bank obtained payment of the cheque for themselves and not for Huggins. Whether the bank is to be regarded as having purchased the cheque or as having advanced him its amount on the

it was held that sect. 82 of the Bills of Exchange Act did not protect a banker who, after ascertaining that a cheque would be paid, had paid the amount, less one shilling for commission, to a stranger, upon his drawing a cheque upon them for such amount;

the transaction being entered in an account kept by the bankers, headed—
“Sundry Customers’ Account.”

(*k*) At p. 491, *supra*.

(*l*) At p. 418 of the report.

(*m*) At p. 423.

(*n*) At pp. 424, 425.

security of it seems to me immaterial. The bank wanted the money for themselves and not for him. They were entitled to hold the money as against him, and were under no obligation to remit it to him. In no ordinary sense of the expression can the bank be regarded as collecting the money for him, although, no doubt, if the bank could keep the money all liability on his part would be at an end, and in that way he would be benefited by their receipt of the money. Sect. 82 of the Act is a mere reproduction of the previous Act of 1876, and the construction put upon that Act in the case of *Matthiessen v. London and County Bank* (o) was, in my opinion, correct. In *Clarke v. London and County Banking Co.* (p) the cheque was paid in for collection, and this was the *ratio decidendi*."

Crediting before Collection.—"The protection afforded by sect. 82," said Collins, M. R., in the case next referred to (q), "must be limited to that which is necessary for the performance of the duty which by the legislation as to crossed cheques was imposed on bankers. If bankers deal with crossed cheques in the ordinary way in which bankers dealt with cheques before the legislation as to crossed cheques, and in which they deal with cheques other than crossed cheques at the present time, namely, by treating them as cash, and upon receipt of them at once crediting the customer with the amount of them in the ordinary way, instead of making themselves a mere conduit pipe for conveying the cheque to the bank on which it is drawn, and receiving the money from that bank for their customer, I think they are collecting the money, not merely for their customer, but chiefly for themselves, and therefore are not protected by sect. 82" (r).

In the *Capital and Counties Bank v. Gordon*; *London, City and Midland Bank v. Gordon* (s), the facts of the first case were as follows: Gordon, who traded as Gordon & Munro, was the holder for value of crossed cheques, drawn by various persons on various

(o) (1879), 5 C. P. D. 7.

(p) [1897] 1 Q. B. 552.

(q) *Gordon v. City and Midland Bank*, [1902] 1 K. B. 242, at pp. 265—266; *sub nom. Capital and Counties Bank v. Gordon*, [1903] A. C. 240.

(r) These words of Collins, M. R., were expressly adopted by Lord Macnaghten on the appeal to the House of Lords in this case, [1903] A. C. 240, at p. 246.

(s) See last note.

banks and payable to Gordon & Munro or order. Gordon had a clerk named Jones who forged indorsements in the name of Gordon & Munro on these cheques, and then took or sent them to the Capital and Counties Bank, where he had an account. Jones also indorsed them in his own name, and the bank credited his account with the amounts, and he drew on his account whilst the amounts of the cheques so paid in stood to his credit. The bank manager dealt in this matter with perfect good faith and without negligence, having no suspicion that anything was wrong. He said he held the cheques until he received payment for Jones and credited his account with the proceeds, and that he received the cheques in the ordinary course of banking business, and that all the cheques were collected for Jones. The bank manager was not cross-examined on these answers, although there was some ambiguity about them. The documents and accounts, however, showed exactly what was done, and it was plain that the bank did not wait until the cheques paid in by Jones had been passed through the clearing-house before their amounts were placed to his credit. They were placed to his credit when he paid the cheques in; and he was allowed to draw upon his account increased by them as above stated. None of the cheques were ever returned to the bank; they were all duly honoured, and the appellant bank received their amounts in due course from the banks on which they were respectively drawn. Afterwards Jones' frauds were discovered, and he was prosecuted and convicted. Gordon, who had been robbed of the cheques and wrongfully deprived of the money represented by them, brought an action against the bank to recover that money which the bank had received under the circumstances above described. It was held that the bank was not protected by sect. 82 of the Bills of Exchange Act.

Lord Macnaghten, in delivering his opinion, said (*t*): "Did the banks receive payment of these cheques for their customer? The character in which a bank receives payment of a cheque is, as has been already said in this House, a question of fact (*u*). To my mind it would have been more satisfactory if the jury under proper

(*t*) At p. 244.

(*u*) *M'Lean v. Clydesdale Banking Co.* (1883), 9 A. C. 95, at p. 115.

directions from the judge had answered this question themselves. It was, however, withdrawn from their consideration. . . . At first sight there is not much difference between the case of a bank which at once credits a customer with the face value of a cheque paid in to his account and allows him to draw against his credit balance thus increased and the case of a bank which, without crediting the customer with the value of a cheque before collection, allows him to overdraw his account in view of the anticipated credit. In each case it was said the credit is only provisional, whether entered in the customer's account or not. In each case it was said payment when received is received for the customer. And in a sense that is true. Then it was urged with some force that practically the only result of upholding the decision under appeal will be to compel some bankers to keep a double set of books where now only one set is required, and thus to impose upon bankers a good deal of extra and perhaps unnecessary trouble. But the protection conferred by sect. 82 is conferred only on a banker who receives payment for a customer—that is, who receives payment as a mere agent for collection. It follows, I think, that if bankers do more than act as such agents they are not within the protection of the section. It is well settled that if a banker before collection credits a customer with the face value of a cheque paid in to his account the banker becomes holder for value of the cheque. It is impossible, I think, to say that a banker is merely receiving payment for his customer and a mere agent for collection when he receives payment of a cheque of which he is the holder for value.”

Lord Lindley, in the course of his speech, said (x) : “ What has to be considered is not the cheque, but its payment. Now, when the cheque was paid to the bank, the bank received the payment for itself rather than for Jones. It is no doubt true that if the cheque had been dishonoured, Jones would have become liable to reimburse the bank the amount advanced by it to him when it placed the amount to his credit. This he would have to do where any cheque, crossed or not, was placed to his credit and was afterwards dishonoured. To this extent and in this sense it may be said that

(x) At p. 248.

the bank received payment for Jones, because payment of the cheque discharged him from the liability he would have been under to repay the bank the sum placed to his credit if the cheque had not been paid. But what your Lordships have to consider is not Jones' liability to the bank if the bank never received payment of the cheque, but for whom did the bank in fact receive such payment. The amount would not be again placed to Jones' credit: it was already there. The bank in its then ignorance of the forgery could not withdraw that credit after it had received payment of the cheque. As between the bank and Jones the money paid belonged to the bank as soon as the bank received it. The bank had a right to sue for the money, and to apply it in any way the bank thought proper, provided only Jones was not treated as owing its amount. . . . It must never be forgotten that the moment a bank places money to its customer's credit the customer is entitled to draw upon it, unless something occurs to deprive him of that right. Nothing occurred in this case to the knowledge of the bank which had any such effect. It appears to me impossible to say that under the circumstances the bank received payment of the cheques in question for their customer Jones."

It may be convenient to observe that it is probable that the law as above laid down will shortly be altered by Parliament (*y*).

Payment into Overdrawn Account.—If the cheque is delivered to the banker for collection, and in fact collected, on behalf of the customer, the banker will none the less be protected by reason of the fact that the customer's account is, at the time, overdrawn (*z*).

Scope of Protection.

Where the section applies it protects the banker, not only in respect of the actual receipt of the money, but in every step taken

(*y*) A Bill was introduced by the Lord Chancellor in 1903, but withdrawn in consequence of the pressure of other business, by which it was proposed to be enacted that "A banker receives payment of a crossed cheque for a customer within the meaning of sect. 82 of the Bills of Exchange Act, 1882, notwithstanding that he credits his customer's account with the amount of

the cheque before receiving payment thereof." At the time of writing (May, 1904) this Bill is again in the House of Lords.

(*z*) *Clarke v. London and County Banking Co.*, [1897] 1 Q. B. 552; referred to by Lord Lindley in *Great Western Railway v. London and County Banking Co.*, [1901] A. C. 414, at p. 425: see p. 495, *supra*.

in the ordinary course of business and intended to lead up to that result.

“The fair meaning of the section is that its protection cannot be limited to the mere receipt of the money. It covers, and was meant to cover, the whole transaction of receiving payment—that is to say, all the necessary dealings with the instrument from its receipt by the bank down to its payment by the bank upon which it is drawn. Everything that is reasonably incidental to the receipt of the money for the customer is included, but anything that is not so incidental is outside the section ” (a).

(a) Per Collins, M. R., in *Gordon v. London City and Midland Bank*, [1902] 1 K. B. 242, at p. 276. Lord Macnaghten expressed himself to the same effect on the appeal to the House of Lords, [1903] A. C. 240, at p. 244.

(496A)

In *Akrokerri (Ashanti) Mines, Ltd. v. Economic Bank, Ltd.* (1904), *The Times*, 7th June, p. 3, the defendant bank, upon receiving cheques for collection, had entered their amounts to the credit of its customer in books of the bank which were not shown to him; and, before forwarding the cheques to its own agent for clearing, had stamped upon them “Account Economic Bank.” It was held by Bigham, J., that these facts did not exclude the bank from the protection of sect. 82 of the Bills of Exchange Act.

Part VI.

BANKERS' DOCUMENTS OF CREDIT.

CHAPTER I.

BANK - NOTES.

IN dealing with this subject it will be convenient first to consider bank-notes generally, and then Bank of England notes and the notes of other banks separately. The differences between the two classes of notes depend upon the distinctive character of the former as legal tender and upon the connected fact that the Bank of England occupies a unique position which in practice ensures that its notes will be paid, and renders all considerations as to presentment for payment within a reasonable time and the like immaterial.

Form and Nature.

“A bank-note is a promissory note, made by a banker, payable to bearer on demand, and intended to circulate as money” (a).

If issued in England, it must be for a sum of not less than 5*l.* (b).

It may be re-issued after payment (c).

A bank-note is deemed to be in circulation from the time it is issued by the banker, or any servant or agent of his, and until it is actually returned to such banker, or his servant or agent (d).

(a) Byles on Bills, 16th ed. p. 10.

(b) 7 Geo. 4, c. 6; 9 Geo. 4, c. 65.

(c) *Reg. v. West* (1856), 26 L. J. M. C. 6. See also 54 & 55 Vict. c. 39,

s. 30, which provides that no stamp duty shall be payable on re-issue.

(d) 8 & 9 Vict. c. 37, s. 17; 8 & 9 Vict. c. 38, s. 8, as to Irish and Scotch

The right of the holder to payment is not barred by the lapse of time before presentment (*e*).

Bank-notes are negotiable instruments. They are also practically money.

“They are not goods, not securities, nor documents for debts, nor are so esteemed: but are treated as money, as cash, in the ordinary course and transaction of business, by the general consent of mankind, which gives them the credit and currency of money to all intents and purposes. They are as much money as guineas themselves are, or any other current coin that is used in common payments as money or cash.” They are “never considered as securities for money, but as money itself. . . . On payment of them, whenever a receipt is required, the receipts are always given as for money, not as for securities or notes” (*f*).

Being like cash, notes in a house will pass under a gift of a house “with all that should be in it” at the testator’s death. It is otherwise as to bonds and other securities, which are only evidence of money being due, and not money itself (*g*). Bank-notes may be the subject of a *donatio mortis causâ* (*h*).

They may be taken in execution (*i*).

notes.* Although this does not seem to be expressly provided as to English notes, it is no doubt equally the case as to them: see 7 & 8 Vict. c. 32.

(*e*) There does not seem to be any distinct authority upon this point; but the statement in the text is in accordance with the generally received opinion, and seems to follow from the nature of bank-notes as part of the currency. It is also implied by the language of sect. 6 of the Bank Act, 1892 (55 & 56 Vict. c. 48), as to Bank of England notes. See also *Hinsdale v. Larned* (1819), 16 Mass. 65, at p. 68.

(*f*) Per Lord Mansfield in *Miller v. Race* (1758), 1 Burr. 452, where Bank of England notes were the actual subject of the decision; but the words of the

Chief Justice appear to be applicable to all bank-notes alike: see *Guardians of Lichfield Union v. Greene* (1857), 1 H. & N. 884, at p. 889, where the language of Lord Mansfield is adopted in the judgment of the Court of Exchequer.

(*g*) *Popham v. Lady Aylesbury* (1748), Amb. 68. See also *Chapman v. Hart* (1749), 1 Ves. sen. 271, at p. 273; *Stuart v. Bute* (*Marquis of*) (1804), 11 Ves. 657, at p. 662; *Mahony v. Donovan* (1863), 14 Ir. Ch. R. N. S. 262 and 388.

(*h*) *Drury v. Smith* (1717), 1 P. Wms. 403; *Miller v. Miller* (1735), 3 P. Wms. 356.

(*i*) 1 & 2 Vict. c. 110, s. 12. See also the County Courts Act, 1888 (51 & 52 Vict. c. 43), ss. 147, 148.

Position of Holder.

A person taking a bank-note honestly and for value becomes its owner and is entitled to have it cashed (*k*); and a person from whom it has been stolen is not entitled to recover it from him (*l*).

In *Ransted v. Bank of England* (*m*) one Lister had requested the plaintiff to cash a Bank of England note for 100*l*. One of the plaintiff's cashiers took the note to the London and South Western Bank, with whom the plaintiff kept an account, and received from them the change for the note, which was then handed to Lister. The note had been stolen, and payment of it was refused at the Bank of England. The London and South Western Bank debited the plaintiff's account with the amount. Mr. Justice Lawrance held that the plaintiff was the holder of the note, and no question being raised as to his *bona fides*, a verdict was entered for him.

In *De la Chaumette v. Bank of England* (*n*) a Bank of England note, which had been stolen in England in February, 1826, was remitted in May, 1827, by a foreign merchant to his correspondent in this country, to whom he was indebted in a sum exceeding the amount of the note. The latter demanded payment; the Bank refused to pay, on the ground that the note had been stolen. At the time when the correspondent was informed of this, he had not made the foreign merchant any advance on the credit of the note. It was held, first, that in trover for the note, the correspondent must be considered the agent of the foreign merchant, and that he could therefore recover upon his title only; and, secondly, that in such action, it having been proved that the note had been stolen, it was incumbent on the plaintiff to show that the foreign merchant had given full value for it (*o*).

Negligence of Holder.—Mere negligence on the part of a person taking a bank-note for value will not prevent him from recovering upon it if it turns out to have been stolen.

(*k*) *Miller v. Race*, see note (*f*) on p. 501, *supra*. Cf. *Benjamin v. Bank of England* (1813), 3 Camp. 417.

(*l*) *Lowndes v. Anderson* (1810), 13 East, 130.

(*m*) (1900), *Journal of the Institute of Bankers*, Vol. XXI. p. 157.

(*n*) (1829), 9 B. & C. 208.

(*o*) See this case explained in *M'Lean v. Clydesdale Banking Co.* (1883), 9 A. C. 95, at p. 114; 50 L. T. 457; and in *Currie v. Misa* (1875), L. R. 10 Ex. 153, at p. 164, and, on appeal to the House of Lords, 1 A. C. 554, at p. 570.

For example, where a money-changer changed a note which had been stolen, and the jury found that he had given full value for it and taken it in good faith without knowing at the time that it had been stolen, but that he had the means of knowledge if he had taken care of certain notices delivered to him, it was held that he was entitled to recover (*p*).

Privity of Holder to Dishonesty.—The holder is *prima facie* entitled to prompt payment of the note, and cannot be affected by the previous fraud of any holder in obtaining it, unless evidence be given to bring it home to his privity. But where a note for 500*l.* had been fraudulently obtained by some person unknown, and on its being presented for payment some time afterwards by an agent of a foreign principal, information was given of the fraud, and the principal was desired to inform the Bank how he came by it, but the only account he would give of it was that he had received it in payment of goods from a man dressed in such a way, of whom he knew nothing; and it was further proved that bank-notes of so large a value were not usually circulated in that foreign country: this was held to be sufficient evidence to be left to a jury of the principal's privity to the original fraud, in an action of trover brought by his agent to recover it from the Bank, who had detained it under the authority of the original owner, to whom it properly belonged. It was further held that the position was not affected by the fact that the agent, who had received it on account, had, after notice, made payments for his principal, which had turned the balance in favour of the agent (*q*).

Loss of Note.

Position of Loser.—The loser has a right to have the amount of the note paid by the Bank, provided he gives a proper indemnity.

If the Bank refuse payment and he accordingly brings an action, an indemnity to the satisfaction of a Master of the Court must

(*p*) *Raphael v. Bank of England* (1855), 25 L. J. C. P. 33. See also *Goodman v. Harvey* (1836), 4 A. & E. 870; Bills of Exchange Act, s. 90. *Snow v. Peacock* (1825), 2 C. & P. 215, cannot now be

considered a case of authority.

(*q*) *Solomons v. Bank of England* (1791), 13 East, 135, note.—See further in this connection, Part VIII. Chap. 7, sect. 4.

be given. The Bank will not then be allowed to set up the loss of the note as a defence (*r*).

Title of Finder.—In *Bridges v. Hawkesworth* (*s*) a person entering a shop found on the floor a bundle of bank-notes, which had been accidentally dropped there by a stranger. The latter could not be discovered. It was held that, as against everyone but the true owner, the property in the notes was in the finder and not in the owner of the shop.

Position of Transferor.

The Bills of Exchange Act provides—

58.—(1) Where the holder of a bill (*t*) payable to bearer negotiates it by delivery without indorsing it, he is called a “transferor by delivery.”

(2) A transferor by delivery is not liable on the instrument.

(3) A transferor by delivery who negotiates a bill thereby warrants to his immediate transferee being a holder for value that the bill is what it purports to be, that he has a right to transfer it, and that at the time of transfer he is not aware of any fact which renders it valueless.

In the case of the *Leeds and County Bank v. Walker* (*u*) a Bank of England note which had been materially altered in number and date was paid to the plaintiffs' bank for value by the defendant, both parties believing the note to be good. The plaintiffs paid away the note, which was afterwards presented at the Bank of England, where the alteration was perceived and payment was refused. The note was returned to the plaintiffs as a bad one, and, after a fortnight spent in tracing the note to the defendant, the plaintiffs demanded payment of it from him, and sued him for the amount. It was held that the plaintiffs having received from

(*r*) Bills of Exchange Act, s. 70; *M'Donnell v. Murray* (1859), 9 Ir. C. L. R. 495; *King v. Zimmerman* (1871), 6 C. P. 466; *Gillett v. Bank of England* (1890), 54 J. P. 7. See also Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), which, apparently, still applies to negotiable instruments other than bills

and notes.

(*s*) (1851), 21 L. J. Q. B. 75. This case was distinguished in *South Staffordshire Water Co. v. Sharman*, [1896] 2 Q. B. 44.

(*t*) This includes notes: see sect. 89.

(*u*) (1883), 11 Q. B. D. 84.

the defendant a worthless note on which no one could be sued, were entitled to recover.

Indorsement of Note.—In *Keene v. Beard* (x) where it was decided that a cheque on a banker payable to bearer was a negotiable instrument, and passed by indorsement, so as to entitle a holder to sue the indorser thereon, Byles, J., in the course of his judgment, said:—"In Story on Promissory Notes, § 132, it is said that, 'although a note payable to bearer is transferable by mere delivery, it may also be transferred by indorsement of the payee, or of any other subsequent holder. In such a case the indorser incurs the same liabilities and obligations as the indorser of a negotiable note payable to order, from many of which, in the case of a mere transfer by delivery, he is exempt.' It is true that a man's name may be and very often is written on the back of a cheque or bill without any idea of rendering himself liable as an indorser. Indeed, one of the best receipts is the placing on the back of the instrument the name of the person who has received payment of it. Such an entry of the name on the instrument is not an indorsement. So, a man frequently puts his name on the back of a bank-note. In all these cases the act of writing may or may not be an indorsement, according to circumstances. All that we mean to decide on the present occasion is that, where a man indorses an instrument of this sort, *animo indorsandi*, and delivers it so indorsed to a third person, he renders himself liable to be sued upon the instrument, as indorsee, by any subsequent holder. I entertain no doubt whatever upon the subject; and I do not think any mischief or inconvenience can result from our so deciding."

Halved Notes.

Right of Holder.—In *Redmayne v. Burton* (y) Mr. Justice Willes expressed the view that a banker would be bound to pay on the production of the half of a bank-note without an indemnity, inasmuch as any person taking a half note takes it with notice (z).

(x) (1860), 8 C. B. N. S. 372, at p. 382.

(y) (1860), 2 L. T. 324.

(z) But see *Mossop v. Eadon* (1810), 16 Ves. 430 (which, however, in *Macartney v. Graham* (1828), 2 Sim. 285, was held

Payment Incomplete.—In *Smith v. Mundy* (a) the plaintiff had agreed to enter into partnership with W., who owed money to the defendant. The plaintiff, with the sanction and authority of W., wrote to the defendant inclosing the halves of two bank-notes, and asking for a statement of the full amount due from W. The defendant wrote acknowledging the receipt of the half notes, and stating that, on receipt of the second halves, he would send a stamped acknowledgment. The agreement for the partnership between the plaintiff and W. went off, and the plaintiff required the defendant to return the half notes. It was held that he was entitled to recover them (b).

Crimes relating to Notes.

Larceny.—By 14 & 15 Vict. c. 100, s. 18, a bank-note may be described as money in an indictment.

In *Reg. v. West* (c) nineteen 5*l.* notes were paid into a branch of a country bank, and sent by post by the manager to another branch at which they had been issued to be re-issued or otherwise disposed of there. It was held that they were still bank-notes within this section, and accordingly that the thief could be properly indicted and convicted for stealing 95*l.* in money.

Halves of notes, if stolen, may be described as goods and chattels (d).

A person may be convicted of stealing an instrument which is invalid in law upon an indictment charging him with stealing a piece of paper (e).

The theft of a bank-note may also be prosecuted under sect. 27 of the Larceny Act, 1861 (24 & 25 Vict. c. 96), relating to valuable securities (f).

False Pretences.—If a person passes a country bank-note as a

to have been overruled by *Hansard v. Robinson* (1827), 7 B. & C. 90; *Mayor v. Johnson* (1813), 3 Camp. 324.

(a) (1860), 29 L. J. Q. B. 172.

(b) See also *Williams v. Smith*, cited at p. 529, *infra*.

(c) (1856), 26 L. J. M. C. 6; *Dears. & B.* 109. Cf. *Rex v. Clark* (1810), R.

& R. 181; 2 Leach, 1036.

(d) *Rex v. Mead* (1831), 4 C. & P. 535.

(e) *Reg. v. Perry* (1845), 1 C. & K. 725; *Rex v. Clark*, see last note. Cf. *Rex v. Vyse* (1829), 1 Moo. C. C. 218; *Rex v. Ranson* (1812), R. & R. 232; *Reg. v. John* (1875), 13 Cox, 100.

(f) See pp. 338, 339, *supra*.

good note and as of its face value, knowing that the bank is insolvent and has stopped payment and cannot pay the note in full, he may be indicted for obtaining by false pretences (*g*).

But where the evidence showed that the bank had paid a dividend, a direction to the jury that there was evidence that the note was not of any value, it being alleged in the indictment that the note was of no value whatever, was held wrong, and the conviction was quashed (*h*).

Forgery.—The Forgery Act, 1861 (24 & 25 Vict. c. 98), provides—

12. Whosoever shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any note or bill of exchange of the Bank of England or of the Bank of Ireland, or of any other body corporate, company or person carrying on the business of bankers, commonly called a bank-note, a bank bill of exchange, or a bank post-bill, or any indorsement on or assignment of any bank-note, bank bill of exchange, or bank post-bill, with intent to defraud, shall be guilty of felony, and, being convicted thereof, shall be liable . . . to be kept in penal servitude for life . . . (*i*).

13. Whosoever without lawful authority or excuse (*k*) (the proof whereof shall lie on the party accused) shall purchase or receive from any other person, or have in his custody or possession (*l*) any forged bank-note, bank bill of exchange, or bank post-bill, or blank bank-note, blank bank bill of exchange, or blank bank post-bill, knowing the same to be forged, shall be guilty of felony, and, being convicted thereof, shall be liable . . . to be kept in penal servitude for any term not exceeding fourteen years.

Instruments of Forging.—It is criminal, without lawful authority or excuse, to make, use or have possession of any frame, &c.

(*g*) *Reg. v. Evans* (1859), 29 L. J. M. C. 20; 1 L. T. 107; 8 Cox, 257; Bell, 187.

(*h*) *Reg. v. Dowey* (1868), 37 L. J. M. C. 52; 11 Cox, 115. See, however, per Gaselee, J., in *Rex v. Spencer* (1828), 3 C. & P. 420; *Reg. v. Williams* (1857), 7 Cox, 351; *Rex v. Flint* (1821), R. & R. 460.

(*i*) See 16 & 17 Vict. c. 2, s. 1; *Rex*

v. Holden (1810), 2 Taunt. 334; *Rex v. Palmer* (1804), 1 B. & P. N. R. 96; R. & R. C. C. 72; 2 Leach, C. C. 978; *Rex v. Giles* (1827), 1 Moo. C. C. 166.

(*k*) See *Dickins v. Gill*, [1896] 2 Q. B. 310; *Reg. v. Harvey* (1871), L. R. 1 C. C. R. 284; *London Gazette*, 4th June, 1897, p. 3131.

(*l*) See sect. 45 of this Act.

for the making of paper, with the name or firm of any person or persons, body corporate, or company carrying on business as bankers, appearing on the substance; or to make, sell, &c. or have possession of such paper (*m*). So as to frames, paper, plates, &c. for preparing forged bank-notes (*n*); or exchequer or treasury bills or exchequer bonds or debentures (*o*); or share warrants or coupons of companies (*p*); or stock certificates or coupons (*q*); or foreign bills or notes (*r*); or India stock certificates or coupons (*s*); stamps (*t*); and paper used for excise licences (*u*).

BANK OF ENGLAND NOTES.

Issue.

The Bank of England may issue bank-notes throughout England and Wales, and has the exclusive privilege of issuing them in London and within three miles thereof (*x*).

Notes issued out of London must be payable at the place of issue (*y*).

Bank of England notes are not subject to stamp duty (*z*).

The issue department must be kept separate and distinct from the banking department (*a*).

The issue of notes by the Bank is regulated as follows.

The Bank Charter Act, 1844, provides—

2. There shall be transferred, appropriated, and set apart by the said governor and company to the issue department of the Bank of England securities to the value of fourteen million pounds, whereof the debt due by the public to the said governor and company shall be and be deemed a part; and there shall also at the same time be transferred,

(*m*) Forgery Act, 1861, s. 18.

(*n*) *Ibid.* ss. 15, 16, 17.

(*o*) *Ibid.* ss. 9, 10, 11; 29 Vict. c. 25, ss. 20, 21, 25; 40 Vict. c. 2, s. 10.

(*p*) 30 & 31 Vict. c. 131, s. 36.

(*q*) 33 & 34 Vict. c. 58, s. 5.

(*r*) Forgery Act, 1861, s. 19.

(*s*) 26 & 27 Vict. c. 73, s. 15.

(*t*) 54 & 55 Vict. c. 38, ss. 13 (9), 14, 15, 16; 32 & 33 Vict. c. 49, s. 8; 47 & 48 Vict. c. 76, s. 7.

(*u*) 61 & 62 Vict. c. 46, s. 12.

(*x*) 9 Geo. 4, c. 23, s. 1.

(*y*) 3 & 4 Will. 4, c. 98, s. 6.

(*z*) Stamp Act, 1891, Schedule, "Bill of Exchange," Exemption (1). See also 9 Geo. 4, c. 23. As to the composition for stamp duty payable by the Bank, see 24 & 25 Vict. c. 3, s. 4; 55 Geo. 3, c. 184, ss. 21 and 22 (the latter being applicable to bank post-bills).

(*a*) Bank Charter Act, 1844 (7 & 8 Vict. c. 32), s. 1.

appropriated, and set apart by the said governor and company to the said issue department so much of the gold coin and gold and silver bullion then held by the Bank of England as shall not be required by the banking department thereof; and thereupon there shall be delivered out of the said issue department into the said banking department of the Bank of England such an amount of Bank of England notes as, together with the Bank of England notes then in circulation, shall be equal to the aggregate amount of the securities, coin, and bullion so transferred to the said issue department of the Bank of England; and the whole amount of Bank of England notes then in circulation, including those delivered to the banking department of the Bank of England as aforesaid, shall be deemed to be issued on the credit of such securities, coin, and bullion so appropriated and set apart to the said issue department; and from thenceforth it shall not be lawful for the said governor and company to increase the amount of securities for the time being in the said issue department, save as herein-after is mentioned, but it shall be lawful for the said governor and company to diminish the amount of such securities, and again to increase the same to any sum not exceeding in the whole the sum of fourteen million pounds, and so from time to time as they shall see occasion; and from and after such transfer and appropriation to the said issue department as aforesaid it shall not be lawful for the said governor and company to issue Bank of England notes, either into the banking department of the Bank of England, or to any persons or person whatsoever, save in exchange for other Bank of England notes, or for gold coin or for gold or silver bullion received or purchased for the said issue department under the provisions of this Act, or in exchange for securities acquired and taken in the said issue department under the provisions herein contained: Provided always, that it shall be lawful for the said governor and company in their banking department to issue all such Bank of England notes as they shall at any time receive from the said issue department or otherwise, in the same manner in all respects as such issue would be lawful to any other person or persons.

3. It shall not be lawful for the Bank of England to retain in the issue department of the said Bank at any one time an amount of silver bullion exceeding one-fourth part of the gold coin and bullion at such time held by the Bank of England in the issue department.

4. All persons shall be entitled to demand from the issue department of the Bank of England Bank of England notes in

exchange for gold bullion, at the rate of three pounds seventeen shillings and ninepence per ounce of standard gold: Provided always, that the said governor and company shall in all cases be entitled to require such gold bullion to be melted and assayed by persons approved by the said governor and company at the expense of the parties tendering such gold bullion.

5. Provided always, that if any banker who on the sixth day of May one thousand eight hundred and forty-four was issuing his own bank-notes shall cease to issue his own bank-notes, it shall be lawful for Her Majesty in Council at any time after the cessation of such issue, upon the application of the said governor and company, to authorize and empower the said governor and company to increase the amount of securities in the said issue department beyond the total sum or value of fourteen million pounds, and thereupon to issue additional Bank of England notes to an amount not exceeding such increased amount of securities specified in such Order in Council, and so from time to time: Provided always, that such increased amount of securities specified in such Order in Council shall in no case exceed the proportion of two-thirds the amount of bank-notes which the banker so ceasing to issue may have been authorized to issue under the provisions of this Act; and every such Order in Council shall be published in the next succeeding *London Gazette*.

6. An account of the amount of Bank of England notes issued by the issue department of the Bank of England, and of gold coin and of gold and silver bullion respectively, and of securities in the said issue department, and also an account of the capital stock, and the deposits, and of the money and securities belonging to the said governor and company in the banking department of the Bank of England, on some day in every week to be fixed by the commissioners of stamps and taxes (*b*), shall be transmitted by the said governor and company weekly to the said commissioners in the form prescribed in the schedule hereto annexed marked (A.), and shall be published by the said commissioners in the next succeeding *London Gazette* in which the same may be conveniently inserted.

7. The Bank of England shall be released and discharged from the payment of any stamp duty, or composition in respect of stamp duty, upon or in respect of their promissory notes payable to bearer on demand; and all such notes shall thenceforth be and continue free and wholly exempt from all liability to any stamp duty whatsoever.

(*b*) Now the Commissioners of Inland Revenue: 12 & 13 Vict. c. 1, s. 1; 53 & 54 Vict. c. 21, ss. 37, 40.

28. In this Act the term "Bank of England notes" shall extend and apply to the promissory notes of the Bank of England payable to bearer on demand. . . .

Notes more than Forty Years Old.—The Bank Act, 1892, provides—

6.—(1.) Where Bank of England notes issued more than forty years have not been presented for payment, the Bank of England may write off the amount, or any proportion of the amount, of the said notes from the total amount of notes issued from the issue department, and the Bank Charter Act, 1844, shall apply as if the amount of notes so written off had not been issued: Provided that—

- (a) A return of the amount of notes so written off shall be forthwith sent to the Treasury and laid by them before Parliament; and
- (b) This section shall not affect the liability of the Bank to pay any note included in the amount so written off, and if it is presented for payment the amount shall either be paid out of the bank-notes, gold coin, or bullion in the banking department; or, if it is exchanged for gold coin or bullion in the issue department, or for a note issued from the issue department, a corresponding amount of gold coin or bullion shall be transferred from the banking department and appropriated to the issue department.

(2.) This section shall be construed as one with the Bank Charter Act, 1844.

Tender.

The 3 & 4 Will. 4, c. 98, provides—

6. A tender of a note or notes of the Bank of England, expressed to be payable to bearer on demand, shall be a legal tender to the amount expressed in such note or notes, and shall be taken to be valid as a tender to such amount for all sums above five pounds on all occasions on which any tender of money may be legally made, so long as the Bank of England shall continue to pay on demand their said notes in legal coin: Provided always, that no such note or notes shall be deemed a legal tender of payment by the governor and company of the Bank of England, or any branch bank of the said governor and company; but the said governor and company are not to become liable or be required to pay and satisfy, at any branch bank of the said governor and com-

pany, any note or notes of the said governor and company not made specially payable at such branch bank; but the said governor and company shall be liable to pay and satisfy at the Bank of England in London all notes of the said governor and company, or of any branch thereof.

The tender of a Bank of England note is not a legal tender, if objected to by the creditor, in Ireland, though such notes may be circulated there (*b*). It is the same in the case of Scotland (*c*).

Alteration of Number.

In *Suffell v. Bank of England* (*d*) the plaintiff sued for the non-payment of notes. It appeared that the notes had been *bonâ fide* purchased by the plaintiff for value, but that before the plaintiff took them the notes had been altered by erasing the numbers upon them and substituting others, with the object of preventing the notes from being traced, as payment had been stopped and a notice issued specifying their numbers. It was held that, although the alteration did not vary the contract, it was material in the sense of altering the notes in an essential part, and that therefore the notes were vitiated, so that the plaintiff could not recover.

In the course of his judgment in the Court of Appeal, Jessel, M. R., said: "A Bank of England note is not an ordinary commercial contract to pay money. It is in one sense a promissory note in terms, but no one can describe it as simply a promissory note. It is part of the currency of the country. It has long been made so by Act of Parliament; it is a legal tender for any sum above 5*l.*, and it must be issued to anyone who brings a certain quantity of bullion to the Bank, and demands it, as he has a right to do, for the purpose of using it as currency. It is protected in a way no other instrument is protected against alteration or mutilation and its preservation in a pure state, to use a term as applied to deeds by some learned judges, is certainly a matter of the utmost importance. It is admitted that the usage of putting the number on the note dates from a long period, and is a custom universally known. One must consider the operation of the Act

(*b*) 8 & 9 Vict. c. 37, s. 6.

(*c*) 8 & 9 Vict. c. 38, s. 15.

(*d*) (1882), 9 Q. B. D. 555; 51 L. J. Q. B. 401; 47 L. T. 146; 30 W. R. 932; 46 J. P. 500.

of Parliament, which says that any man who produces at the Bank of England a certain quantity of gold bullion shall be entitled to receive bank-notes. Could it be contended that the Bank wanting to buy bullion, and not wanting to increase the circulation of notes, could give to the person who brought the bullion notes without numbers? The man who received the notes in such an unusual form could not make use of them as currency, because no one would take them; and, I take it, the Act means a note in the ordinary form in which the Bank issues Bank of England notes. I do not mean to say that the Bank of England might not alter its ordinary form, but I mean that it could not comply with the terms of that Act of Parliament unless it issued to the man who so brought bullion notes in the accustomed and ordinary form, so that they would enable him to use them as currency. The number on notes has another important use. It enables the person who receives notes to trace them and so to detect crime as well as to guard against the commission of crime by reason of the knowledge that the notes may be so traced. But the utility of the number does not stop there. We have been told there is a relation between the date and the number which enables the Bank more easily, no doubt, to detect forgery, if the Bank found that relation altered, and also to enable it to keep a register of the notes issued against the notes coming in, so as to ascertain the amount for which the Bank is liable. Therefore, knowing the use made of the number, the mode in which it is regarded by the public, and in which it is utilized by the Bank, no one could say that the number was not a material part of the note" (e).

COUNTRY BANK-NOTES.

Right to Issue.

I. Beyond 65 miles from London, all banking firms and companies which were lawfully issuing notes under a licence on the 6th May, 1844, may continue to issue them, except firms or companies which then consisted of not more than six members, and whose members have since increased in number (f).

(e) Cf. *Leeds and County Bank v. Walker*, cited at p. 504, *supra*.

(f) 7 Geo. 4, c. 46; Bank Charter Act, 1844 (7 & 8 Vict. c. 32), s. 11; Bills of Exchange Act, s. 97 (3) (e).

II. Within 65 and beyond three miles from London, banking firms and companies which consisted of not more than six members on the 6th May, 1844, and were then lawfully issuing them under a licence, and whose numbers have never exceeded six, may continue to issue them (*g*).

III. In London, and within three miles thereof, these notes cannot be issued at all, the Bank of England having the monopoly (*h*).

The amount of the issue authorized is limited by the Bank Charter Act. No banker is to have in circulation upon the average of four weeks a greater amount of notes than the amount certified in accordance with provisions contained in the Act as the average amount of his bank-notes in circulation during the twelve weeks preceding the 27th April, 1844 (*i*).

A banker exceeding his limit forfeits a sum equal to the excess (*k*).

The privilege of continuing the issue of bank-notes is not prejudiced by any change in the personal composition of the firm or company, either by transfer of shares or the admission of any new partner or member, or the retirement of any partner or member: subject to the qualification that if, on the 6th May, 1844, the firm or company consisted of not more than six persons, it loses the right of issue if at any time the number exceeds six (*l*).

If two banks, each of which consists of not more than six members, unite, they may obtain a certificate of the aggregate of the amounts they were entitled to issue, and the united body may issue notes to that extent provided that the united bank may not issue notes after the number of partners therein shall exceed six in the whole (*m*).

The privilege is lost by bankruptcy, ceasing to carry on the business of a banker, or discontinuing the issue either by agreement with the Bank of England or otherwise (*n*).

Save as aforesaid, it is not lawful for any one to make or issue

(*g*) 9 Geo. 4, c. 23; 3 & 4 Will. 4, c. 98, s. 2; Bank Charter Act, 1844, s. 11.

(*h*) 9 Geo. 4, c. 23, s. 1.

(*i*) 7 & 8 Vict. c. 32, s. 13.

(*k*) Sect. 17.

(*l*) Sect. 11.

(*m*) Sect. 16.

(*n*) Sect. 12. See *Smith v. Everett* (1859), 29 L. J. Ch. 236.

bank-notes in any part of the United Kingdom (*o*); or for any banker to draw, accept, make or issue, in England or Wales, any bill of exchange or promissory note, or engagement for the payment of money payable to bearer on demand, or to borrow, owe, or take up, in England or Wales, any sums or sum of money on the bills or notes of such banker payable to bearer on demand (*p*).

In this connection the term "banker" extends and applies to all corporations, societies, partnerships and persons, and every individual person carrying on the business of banking, whether by the issue of bank-notes or otherwise (*q*).

The Stamp Act, 1854 (*r*), provides—

11. All bills, drafts, or notes (other than notes of the Bank of England) which shall be issued by any banker or the agent of any banker for the payment of money to the bearer on demand, and all bills, drafts, or notes so issued which shall entitle or be intended to entitle the bearer or holder thereof, without indorsement, or without any further or other indorsement than may be thereon at the time of the issuing thereof, to the payment of any sum of money on demand, whether the same shall be so expressed or not, in whatever form and by whomsoever such bills, drafts, or notes shall be drawn or made, shall be deemed to be bank-notes of the banker by whom or by whose agent the same shall be issued within the meaning of the said three several Acts last mentioned (*s*), and within all the clauses, provisions, and regulations thereof respectively.

12. All bills, drafts, and notes which, by, or under this Act, or the said three several Acts last mentioned, or any of them respectively, are declared or deemed to be bank-notes, shall be subject and liable to the stamp duties, and composition for stamp duties, imposed by or payable under any Act or Acts in force upon or in respect of promissory notes for the payment of money to the bearer on demand; and all clauses, provisions, regulations, penalties and forfeitures contained in any Act or Acts relating to the issuing of such promissory notes, or for securing the said stamp duties and composition respectively, or for preventing or punishing frauds or evasions in relation thereto, shall respectively be deemed to apply to all such bills, drafts,

(*o*) Sect. 10.

(*r*) 17 & 18 Vict. c. 83.

(*p*) Sect. 11. Cf. 39 & 40 Geo. 3, c. 28, s. 15, and 3 & 4 Will. 4, c. 83, s. 2.

(*s*) *I.e.*, the Bank Charter Act, 1844; 8 & 9 Vict. c. 38 (Scotland); and 8 & 9

(*q*) 7 & 8 Vict. c. 32, s. 28.

Vict. c. 37 (Ireland).

and notes as aforesaid, and to the stamp duties and composition payable upon or in respect thereof, anything in this Act, or any other Act or Acts, to the contrary notwithstanding.

In *Attorney-General v. Birkbeck* (t) it appeared that in 1880 a firm of bankers, entitled to issue their own notes under the exception in sect. 11 of the Bank Charter Act, 1844, sold their business to a limited liability company upon the following terms:—The company took over the whole of the business as a going concern, and the goodwill, except and reserving to the firm the right to issue their own notes, but including in the sale and purchase such benefit of the issue as was thereby agreed to be given to the company; the firm were to issue their notes in the same form as theretofore, but through the company's officers only, and might nominate those officers and make the returns required by statute through them: the company were to allow and pay the firm 2½ per cent. interest on the amount of all notes from time to time in circulation: for the purposes of the issue only the firm might continue to use their accustomed name, but they were not to assign their rights nor to take new partners for the purpose of continuing the issue without the consent of the company, nor to carry on the business of banking within a defined district without the like consent, except so far as related to the issue of their notes under the agreement: if the right of issue should at any time be taken away from the firm they were to pay any compensation they might receive to the company, unless the company should get an equal right of issue, in which case the firm might retain the compensation: if the company acquired a right to issue their own notes, the firm's right of issue was to cease. When the business was taken over by the company, a large number of the firm's notes being in circulation, the amount of them was deducted from the purchase-money, and the notes, when presented for payment, were cashed by the company, and re-issued by them. Notes in hand when the business was taken over were treated as cash lent by the firm to the company. Daily returns were made by the company showing the number of the firm's notes in circulation, and twice a year the company paid 2½ per cent. interest to the firm on the amount so ascertained. On an

(t) (1884), 12 Q. B. D. 605.

information against the firm and the company for penalties in respect of their having issued the notes contrary to the provisions of the Act, it was held that the company had "issued" the notes within the meaning of sect. 11 of the Bank Charter Act, 1844; that the firm, in issuing the notes, were not protected by the exception in sect. 11, because after the making of the agreement they had "ceased to carry on the business of bankers" within the meaning of sect. 12, and therefore that all the defendants were liable.

Licence.

A banking firm or company issuing notes must annually take out a licence, on which a duty of 30*l.* is charged, and which authorizes the issue of notes on unstamped paper (*u*). A separate licence must be taken out for every town or place where notes are issued, subject to the exception that any banker who, before the 6th May, 1844, had taken out four licences which were in force on that day for the issue of notes at more than four towns or places is not required to obtain more than four licences for the issue of notes at the same towns or places (*x*).

Accounts of Issue.

The Bank Charter Act, 1844, provides—

18. Every banker in England and Wales, who after the tenth day of October, One thousand eight hundred and forty-four, shall issue bank-notes, shall on some one day in every week after the nineteenth day of October, One thousand eight hundred and forty-four (such day to be fixed by the Commissioners of Stamps and Taxes), transmit to the said Commissioners an account of the amount of the bank-notes of such banker in circulation on every day during the week ending on the next preceding Saturday, and also an account of the average amount of the bank-notes of such banker in circulation during the same week; and on completing the first period of four weeks, and so on completing each successive period of four weeks, every such banker shall annex to such account the average amount of bank-notes of such banker in circulation during the said four weeks,

(*u*) 55 Geo. 3, c. 184, ss. 24—28; 9 s. 35.

Geo. 4, c. 23, s. 2; 24 & 25 Vict. c. 91, (*x*) 7 & 8 Vict. c. 32, s. 22.

and also the amount of bank-notes which such banker is authorized to issue under the provisions of this Act; and every such account shall be verified by the signature of such banker or his chief cashier, or, in the case of a company or partnership, by the signature of a managing director or partner, or chief cashier of such company or partnership, and shall be made in the form to this Act annexed, marked (B); and so much of the said return as states the weekly average amount of the notes of such bank shall be published by the said Commissioners in the next succeeding London Gazette in which the same may be conveniently inserted; and if any such banker shall neglect or refuse to render any such account in the form and at the time required by this Act, or shall at any time render a false account, such banker shall forfeit the sum of one hundred pounds for every such offence (y).

Ascertainment of Average.

The Bank Charter Act, 1844, provides—

19. For the purpose of ascertaining the monthly average amount of bank-notes of each banker in circulation, the aggregate of the amount of bank-notes of each such banker in circulation on every day of business during the first complete period of four weeks next after the tenth day of October, One thousand eight hundred and forty-four, such period ending on a Saturday, shall be divided by the number of days of business in such four weeks, and the average so ascertained shall be deemed to be the average of bank-notes of each such banker in circulation during such period of four weeks, and so in each successive period of four weeks, and such average is not to exceed the amount certified by the Commissioners of stamps and taxes as aforesaid (z).

Compositions.

The Bank Charter Act, 1844, provides, by sects. 23 and 24, for the payment by the Bank of England of annual compositions to certain bankers as the compensation for the loss of the privilege of issuing their own bank-notes. Such compositions cease to be payable if and when such bankers cease to carry on business (a).

(y) As to returns of notes by a colonial bank, see *Oriental Bank Corporation v. Wright* (1880), 5 A. C. 842.

(z) As to inspection of books, see sect. 20.

(a) See also 19 & 20 Vict. c. 20.

In *Capital and Counties Bank v. Bank of England* (b) the facts were as follows: In 1834 the Hampshire Banking Company was established at Southampton, and the deed of settlement provided that "the bank shall be carried on at Southampton, and nowhere else." In 1841 the Hampshire Bank, by agreement with the Bank of England, ceased to issue its own notes, and henceforth issued Bank of England notes only, and when the Bank Charter Act, 1844, was passed, the Hampshire Banking Company was scheduled as one of the banks entitled to a composition from the Bank of England under sect. 23 of the Act. The Hampshire Bank passed through many changes, and in 1876 it opened a branch in London and carried on business there. In 1876, also, a new banking business was acquired and a new company was formed under the name of the "Hampshire and North Wilts Banking Company." In 1878 this latter company acquired another business in London, and the name was changed to that of the "Capital and Counties Bank," which was registered, in 1880, under the Companies Acts. The Bank of England had thereafter continued to pay to the "Capital and Counties Bank" the yearly composition due in respect of the Hampshire Banking Company; but, in 1886, they refused to pay, on the ground that the right to the composition had been lost by the removal of the business to London and by amalgamation with other banks. It was, however, held that the Hampshire Banking Company having been granted the composition under the Act as a *persona designata*, they had not lost their right to it by transferring their business to London, or by amalgamation with the Capital and Counties Bank or otherwise, and that the plaintiffs were accordingly entitled to recover.

In *Prescott, Dimsdale, Cave, Tugwell & Co. v. Bank of England* (c) a company had been incorporated for the purpose of purchasing and carrying on the business of four banks—two of which carried on business in London, one at Bristol, and one at Bath. The Bristol bank was entitled, under sect. 24, and the Bath bank, under sect. 23 of the Act, to be paid by the Bank of England a composition for having ceased to issue their own bank-notes. The four

(b) (1889), 61 L. T. 516; 5 T. L. R. 738.

(c) [1894] 1 Q. B. 351.

firms agreed to sell their businesses to the company when formed, the consideration being the allotment to them of shares in the company, and also agreed that they would not in future carry on business as bankers. This agreement was adopted by the company when formed, and the businesses of the four banks were thenceforth carried on by the company in its own name at the same places as before and with the same staffs of clerks. It was held, under these circumstances, that the banks must be taken to have ceased to carry on their business, and that the company was not entitled to be paid any composition by the Bank of England.

Lord Justice Lindley distinguished this case from that of *Capital and Counties Bank v. Bank of England* (*d*) as follows: "The Capital and Counties Bank was an old firm which, the learned Lord (Lord Bowen) held, had preserved its identity notwithstanding the change of name and other changes, and which old firm was registered as an existing firm under Part VII. of the Companies Act, 1862, and, this being so, the rights and obligations of the old firm became the rights and obligations of the registered company (see sect. 193). But the present company is an entirely new company, formed and registered as such under Part I. of the Act, and having no rights or obligations except such as it acquires or incurs after registration. It cannot itself acquire a new right to be paid a composition under the Act of 1844; and the old firms have by ceasing to carry on business, lost their right to its continuance. Having done so, they have no right to any composition which they can enjoy themselves or transfer to others." Lord Justice Smith also pointed out that, in the *Capital and Counties Bank* case, Lord Bowen held, "that the Hampshire Bank (which had the right to the composition) by absorbing other banks into itself, did not lose its identity, but still carried on the same banking business, although it changed its name and place of business. Here, on the contrary, the banks which had the right to composition are swallowed up and absorbed in a new company, limited, and no longer exist" (*e*).

(*d*) See note (*b*), on the preceding page. *of England*, [1904] 1 K. B. 149; 20 T.

(*e*) Cf. *Bell v. National Provincial Bank* L. R. 97, cited at p. 42, *supra*.

Stamp Duty.

The following duties are imposed by the Stamp Act, 1891 (*f*):—

BANK-NOTE—				£	s.	d.
For money not exceeding 1 <i>l.</i> (<i>g</i>)				0	0	5
Exceeding 1 <i>l.</i> and not exceeding 2 <i>l.</i>				0	0	10
„	2 <i>l.</i>	„	5 <i>l.</i> (<i>g</i>)	0	1	3
„	5 <i>l.</i>	„	10 <i>l.</i>	0	1	9
„	10 <i>l.</i>	„	20 <i>l.</i>	0	2	0
„	20 <i>l.</i>	„	30 <i>l.</i>	0	3	0
„	30 <i>l.</i>	„	50 <i>l.</i>	0	5	0
„	50 <i>l.</i>	„	100 <i>l.</i>	0	8	6

But a bill or note issued by the Bank of England or the Bank of Ireland is exempt from stamp duty (*h*). So is a bill or note issued by bankers paying a composition in lieu of stamps (*i*).

The Stamp Act, 1891 (*k*), provides:—

29. For the purposes of this Act the expression “banker” means any person carrying on the business of banking in the United Kingdom, and the expression “bank-note” includes—

- (a) Any bill of exchange or promissory note issued by any banker, other than the Bank of England, for the payment of money not exceeding one hundred pounds to the bearer on demand; and
- (b) Any bill of exchange or promissory note so issued which entitles, or is intended to entitle, the bearer or holder thereof, without indorsement or without any further or other indorsement than may be thereon at the time of the issuing thereof, to the payment of money not exceeding one hundred pounds on demand, whether the same be so expressed or not, and in whatever form, and by whomsoever the bill or note is drawn or made.

30. A bank-note issued duly stamped, or issued unstamped, by a banker duly licensed or otherwise authorized to issue unstamped bank-notes, may be from time to time re-issued without being liable to any stamp duty by reason of the re-issuing.

(*f*) 54 & 55 Vict. c. 39, Schedule, “Bank Note.”

(*g*) Bank-notes cannot be issued in England for less than 5*l.* See p. 500, *supra*.

(*h*) Sect. 29; Schedule, “Bill of Ex-

change,” Exemption (1).

(*i*) 9 Geo. 4, c. 23; 7 Geo. 4, c. 46, s. 16; 7 & 8 Vict. c. 32, s. 22; 17 & 18 Vict. c. 83, s. 12; 54 & 55 Vict. c. 39, s. 30.

(*k*) 54 & 55 Vict. c. 39.

31.—(1) If any banker, not being duly licensed or otherwise authorized to issue unstamped bank-notes, issues, or permits to be issued, any bank-note not being duly stamped, he shall incur a fine of fifty pounds.

(2) If any person receives or takes in payment, or as a security, any bank-note issued unstamped contrary to law, knowing the same to have been so issued, he shall incur a fine of twenty pounds.

The Stamp duty may be compounded, and the right to issue notes on unstamped paper obtained (*l*).

The affidavit verifying the return of the issue by a banker of unstamped bills and notes under the 9 Geo. 4, c. 23, may be sworn, either before a justice of the peace under sect. 7 of that statute, or before a Commissioner to administer oaths in Chancery under the 55 Geo. 3, c. 184, s. 52, the later enactment being cumulative only (*m*).

The manager of a bank is a chief clerk within the meaning of the 9 Geo. 4, c. 23, s. 7, which requires such affidavit to be made by a cashier, accountant, or chief clerk (*m*).

Stoppage of Bank.

The various acts of bankruptcy and the circumstances under which a company may be wound up are enumerated above at pages 20—23 and 38—40.

Right to Interest.—The stopping payment by a bank which has issued notes payable on demand does not preclude the necessity of demanding payment in order that interest may begin to accrue (*n*).

In *In re The East of England Banking Company* (*o*) a banking company stopped payment and was voluntarily wound up. The debts being paid in full, it was held that interest at 5*l.* per cent. was payable on all promissory notes, drafts, and other negotiable

(*l*) This composition is, in England and Ireland, at the rate of 3*s.* 6*d.* per 100*l.* or a fraction thereof of the notes and bills in circulation, and is payable half-yearly: 9 Geo. 4, c. 23, s. 7; 5 & 6 Vict. c. 82, s. 2; 16 & 17 Vict. c. 59, s. 20; 16 & 17 Vict. c. 63, s. 7; 27 & 28 Vict. c. 86, s. 1; 30 & 31 Vict. c. 89,

s. 1.

(*m*) *Reg. v. Greenland* (1867), L. R. 1 C. C. R. 65.

(*n*) *In re The Herefordshire Banking Co.* (1867), 36 L. J. Ch. 806; 4 Eq. 250.

(*o*) (1868), 38 L. J. Ch. 121; 4 Ch. 14.

instruments current at the time of the stoppage, not from the time of the stoppage, but from the respective times of the claims in respect thereof being sent in to the liquidators. The stoppage of the bank did not operate to dispense with the necessity of making a demand, but the claim made to the liquidator was a sufficient presentation and demand for payment according to the law of merchants.

Liability of Members.—This subject is treated above, at pages 26 and 27.

Set-off.

The Bankruptcy Act, 1883, provides :—

38. Where there have been mutual credits, mutual debts, or other mutual dealings between a debtor against whom a receiving order shall be made under this Act, and any other person proving or claiming to prove a debt under such receiving order, an account shall be taken of what is due from the one party to the other in respect of such mutual dealings, and the sum due from the one party shall be set off against any sum due from the other party, and the balance of the account, and no more, shall be claimed or paid on either side respectively; but a person shall not be entitled under this section to claim the benefit of any set-off against the property of a debtor in any case where he had at the time of giving credit to the debtor, notice of an act of bankruptcy committed by the debtor and available against him.

Where there have been mutual dealings between a debtor and his creditor, the line as to set-off must as a general rule, and in the absence of special circumstances, be drawn at the date of the commencement of the bankruptcy (*p*).

Knowledge of insolvency is not equivalent to notice of an act of bankruptcy. In *Hawkins v. Whitten* (*q*), which was an action brought by the assignees of certain bankers, it was held under 6 Geo. 4, c. 16, s. 50, that a party had a right to set off notes of such bankers taken by him after he knew that they had stopped

(*p*) *In re Gillespie, Ex parte Reid* (1885), 14 Q. B. D. 963.

(*q*) (1829), 10 B. & C. 217.

payment, but before he knew that they had committed an act of bankruptcy (*r*).

Where a right of set-off is defeated by unfair means, the party who has been circumvented may have a right of action to recover money paid by him. Thus, in *Edmeads v. Newman* (*s*), A. & Co. and B. & Co. respectively carried on the business of bankers at Maidstone. B. & Co. became bankrupts; and at the time of their act of bankruptcy the two banks held notes and other securities of each other to nearly the same amount. The provisional assignee of B. & Co., knowing that fact, presented and obtained payment of the notes of A. & Co., partly at their bank and partly at the house of their agents in London, who were ignorant of the situation in which the parties stood. It was held that A. & Co. might recover the amount so received in an action for money had and received against the provisional assignee.

The right of set-off does not arise upon bankruptcy where a debt legally due to the debtor from the bankrupt is really due to him as trustee for another, even though a set-off would arise in such a case between solvent parties. Thus, in *Forster v. Wilson* (*t*), the defendants, being indebted for money advanced to them on their banking account by their bankers, who subsequently became bankrupt, received from their customers, on the day on which the bank stopped payment and the day following, but without notice of an act of bankruptcy, and before any docket had been struck, certain 5*l.* notes of the bank, payable to bearer on demand, in part payment of antecedent debts, on the condition that they were to debit themselves with so much only as they should receive from the assignees for such notes. They also received, during the same period, other 5*l.* notes of the bank, for which they were to pay so much only as they should receive from the assignees for such notes. An action having been brought by the assignees of the bankrupts against the defendants for money lent by the bankrupts before their bankruptcy, it was held that the defendants had a beneficial interest in the first-mentioned class of notes, and were therefore entitled to set

(*r*) In view of the terms of sect. 38 of the Bankruptcy Act, a case like *Dickson v. Cass* (1830), 1 B. & Ad. 343, would now be decided differently.
 (*s*) (1823), 1 B. & C. 418.
 (*t*) (1843), 12 M. & W. 191.

them off; but that they were not entitled to set off the last-mentioned class, as they held them merely as trustees for others.

In connection with this subject, reference should be made to pp. 233—238.

Tender.

A tender of country bank-notes will operate as a legal tender only if the creditor does not object to be paid in this form (*u*).

Effect as Payment.

Where a note is accepted as the price of goods sold, or in exchange for bills or other notes, as a general rule it amounts to payment, and if the bank fails before it is presented the loss falls upon the person who has received it. But where a note is accepted in respect of a pre-existing debt, or is changed for the accommodation of the transferor, it does not amount to absolute payment, and if it is presented in due time but is dishonoured and notice of dishonour is duly given, the person who accepted it has a right to be paid its amount by the transferor. It will be the same where, from the circumstances of the case, a like intention on the part of the transferor and transferee may be inferred.

Accordingly, a person taking a country bank-note in payment of a debt should forward it for presentment, or circulate it, the day after he receives it, if he wishes to preserve his right to sue the person from whom he received it on the debt in respect of which it was given, in the event of the bank failing.

“Taking a note for goods sold,” said Holt, C. J., in *Ward v. Evans* (*x*), “is a payment, because it was part of the original contract; but paper is no payment where there is a precedent debt. For when such a note is given in payment, it is always intended to be taken under this condition, to be payment if the money be paid thereon in convenient time. This note was demanded within convenient time, but if the party who takes the note, keep it by

(*u*) *Ward v. Evans* (1704), 2 Ld. Raym. 928; *Tiley v. Courtier* (1817), 2 C. & J. 16, note (*c*); *Lockyer v. Jones* (1796), 1 Peake, N. P. 239, note; *Polglass v. Oliver* (1831), 2 C. & J. 15; *Forster v.*

Wilson (1843), 12 M. & W. 191, at p. 201. See also *Owenson v. Morse* (1796), 7 T. R. 64.

(*x*) (1704), 2 Ld. Raym. 928, at p. 930.

him for several days, without demanding it, and the person who ought to pay it becomes insolvent, he that received it must bear the loss; because he prevented the other person from receiving the money by detaining the note in his custody."

"If a bill or note, made or become payable to bearer, be delivered without indorsement, not in payment of a pre-existing debt, but by way of exchange for goods, for other bills or notes, or for money transferred to the party delivering the bill at the same time, such a transaction has been repeatedly held to be a sale of the bill by the party transferring it, and a purchase of the instrument, with all risks, by the transferee. . . . Such seems the general rule governing the transfer by delivery, not only of ordinary bills of exchange and promissory notes, but also of bank-notes. . . . The rule, however, is not without exceptions. If a banker's note be given on account of a pre-existing debt, the note is not to be considered as sold. But if the banker fail and if the note be duly presented, and due notice be given of the dishonour, the remedy for the antecedent debt revives. . . . And it is conceived, that as an express contract would make the transferor liable without indorsement, so there are other circumstances from which a jury may infer that the intention, and implied contract of the parties was, that the notes were not to be payment, if dishonoured" (y).

Acceptance as Payment.—The effect of a note as payment is well illustrated by *Guardians of Lichfield Union v. Greene* (z). There the defendant had executed a bond conditioned to be void if G. should honestly, diligently and faithfully perform and discharge the duties of his office as treasurer of a poor-law union. One of the duties was to pay out of any money for the time being in his hands belonging to the guardians, all orders, &c. drawn upon him. G. was a country banker issuing his own notes. On the 28th of December the plaintiffs, the guardians of the union, drew several orders for money, some of which were presented for payment at G.'s bank on that day, and paid partly in cash and the residue in notes of the bank. On the 31st of December the officer of the union presented other orders, and received 200*l.* in notes of G.'s

(y) Byles, 16th ed. pp. 188—190.

(z) (1857), 1 H. & N. 884; 26 L. J. Ex. 140.

bank. G. stopped payment at three o'clock on that day, and on the 1st January was declared bankrupt. At the time of the presentment of the orders G. had in his hands sufficient money of the guardians to pay them. It was held that the defendant was not liable to make good either of these sums of money to the plaintiffs.

Baron Bramwell, in delivering the judgment of the Court of Exchequer, said:—"Upon behalf of the plaintiffs it was argued that it was the duty of Richard Greene to pay the orders, and that the delivery by him of his own promissory notes, which were afterwards not paid, was no payment, and the case was likened to the payment of a debt by a bill of exchange or promissory note afterwards dishonoured, under which circumstances it was stated to be clear and admitted law that the creditor could sue for the original debt. On the other hand, it was argued on behalf of the defendant that this was not a payment by a bill of exchange or promissory note as ordinarily understood, but a payment by bank-notes which were treated as money or cash both by the party paying and the party receiving; that the clerk or officer of the plaintiff might, if he thought fit, have insisted upon being paid in gold or in notes of the Bank of England, and that he, having elected to be paid in the manner in which he was, could not after the stoppage of the bank repudiate it, and insist that it was not payment as against the defendant, a surety. It seems to be clear that a bank-note is not to be considered, in all respects at least, as a bill of exchange or promissory note, payable at a distant date." His Lordship then quoted Lord Mansfield's judgment in *Miller v. Race* (a), and proceeded: "Bank-notes are also treated of and dealt with in a variety of Acts of Parliament (the Bank Acts and others), and restrictions put upon their issue and form. In England, practically, they cannot be issued for a less sum than 5*l.* (b); but it is notorious that in Scotland and Ireland local or country 1*l.* bank-notes form the great bulk of the ordinary currency of the country, and are in universal use. Bank of England notes are now a legal tender for all sums above 5*l.*, except at the Bank of England and its branches, and country bank-notes are also a legal tender, unless

(a) See p. 501, *supra*.

(b) See p. 500, *supra*.

objected to at the time on that account. . . . It seems, therefore, clear that bank-notes are in many respects different from bills of exchange and promissory notes ordinarily so called. The question as to the effect of payment by bank-notes, when the bank either has stopped at the time of the payment or shortly after, has been frequently the subject of legal discussion, and the case of *Camidge v. Allenby* (c) seems to contain the existing law upon the subject. In that case a distinction was taken between a payment by bank-notes at the time of the sale or of the original transaction and a payment by bank-notes of a pre-existing debt. Bayley, J., whose opinion upon the subject is not expressed to be to the same extent as those of Holroyd, J., or Littledale, J., says: 'If the notes had been given to the plaintiff at the time when the corn was sold, he could have had no remedy upon them against the defendant. The plaintiff might have insisted upon payment in money. But if he consented to receive the notes as money, they would have been taken by him at his peril. If, indeed, he could show fraud or knowledge of the maker's insolvency in the payer, then it would be wholly immaterial whether they were taken at the time of sale or afterwards.' . . . Both payments—viz., that on the Friday and on the Monday—seem to be within the principle laid down by Bayley, J., in respect of payment made by bank-notes at the time of the sale or transaction, unless the circumstance that the person paying was also the maker of the notes causes a difference. The liability to pay created by the bond and condition was to do so upon the orders being presented for payment. Immediately upon being presented they were paid, and therefore, according to the above principle, the bank-notes were taken at the peril of the plaintiff, and we think the circumstance of Mr. Richard Greene being the maker is immaterial, for the plaintiffs have the right to prove against his estate to the amount of the notes, the same as the amount paid; and we are of opinion that the obligation of the defendant being that Richard Greene should, upon the presentment of the orders, pay them, when the plaintiffs, who were entitled to insist upon receiving sovereigns or Bank of England notes, thought fit to receive the bank-notes, that the obligation of the defendant was thereby satisfied and discharged."

(c) (1827), 6 B. & C. 373. See p. 530, *infra*.

The case of *James v. Holditch* (*d*) appears to be against the current of authority. There a servant received on behalf of his master, in payment for goods sold, country bank-notes at 1 o'clock on a Friday afternoon, and paid them to his master, who was away from home the whole of Friday, on settling his accounts on Saturday evening. On the Monday following the notes were presented at the banking-house. Between 3 and 4 on Saturday afternoon the bank had stopped payment. It was held that the master was not guilty of laches in not presenting the notes before the bank stopped payment.

It seems probable that in this case the attention of the Court was not directed to the distinction between the acceptance of notes in payment for goods, or bills, or other notes delivered at the time, and the acceptance of notes in respect of a pre-existing debt. It is possible, however, that the decision proceeded upon the ground that the servant had no authority to accept notes, and accordingly that the master could not be held to have accepted them in absolute payment.

Acceptance for Debt.—It has been already pointed out (*e*) that, in this case, the payment is not absolute. If the note is presented in due time and dishonoured, and notice of dishonour is duly given, the person who received it has a right to be paid its amount by the transferor.

Where the defendant, being indebted to the plaintiff, paid to him the debt in country bank-notes on a Friday, several hours before the post went out, and the plaintiff transmitted them partly by coach on Saturday and partly by Sunday night's post, and both parts arrived in London on Monday, and were presented for payment and dishonoured on the Tuesday, it was held that the true rule is that a party in order to avoid laches must give notice by the next day's post, and not by the next possible post; and that the plaintiff in so transmitting these notes had been guilty of no laches, and might consider them as no payment, and recover for the original debt (*f*).

(*d*) (1826), 8 Dow. & Ry. 40.

(*e*) At p. 525, *supra*.

(*f*) *Williams v. Smith* (1819), 2 B. & Ald. 496.

In *Camidge v. Allenby* (*g*) goods were sold at York on the 10th December, 1825. On the same day at three in the afternoon the purchaser delivered to the vendor as and for a payment of the price certain promissory notes of the bank of Dobson & Sons at Huddersfield, payable on demand to bearer. Dobson & Sons stopped payment at eleven in the morning of the 10th, and never afterwards resumed their payments; but neither of the parties knew of the stoppage or of the insolvency of Dobson & Sons. The vendor never circulated the notes, or presented them to the bankers for payment; but on the 17th he required the purchaser to take back the notes and to pay him the amount thereof, which the latter refused. It was held that the vendor had been guilty of laches, and had thereby made the notes his own, and consequently that they operated as a satisfaction of the debt.

“Here,” said Mr. Justice Bayley (*h*), “the notes were given to him” (the plaintiff) “in payment subsequently” (to the sale of the corn), “and the question is, whether they operate as a discharge of the debt due to the plaintiff in respect of the corn. The rule as to all negotiable instruments is, that if they are taken in payment of a pre-existing debt, they operate as a discharge of that debt, unless the party who holds the instrument does all that the law requires to be done, in order to obtain payment of them. Then the question is, what it was the duty of the plaintiff to do in order to obtain payment of these notes. They were intended for circulation. But I think that he was not bound immediately to circulate them, or to send them into the bank for payment; but he was bound, within a reasonable time after he had received them, either to circulate them or to present them for payment. Now here it is conceded, that if there had not been any insolvency of the bankers, the notes should have been circulated or presented for payment on the Monday. It is clear that the plaintiff on that day might have had knowledge that the bankers had stopped payment, and having that knowledge, if presentment was unnecessary, he had then another duty to perform. In consequence of the negotiable nature of the instruments, it became his duty to give notice

(*g*) (1827), 6 B. & C. 373. In this case *Swinyard v. Bowes* (1816), 5 M. & S. 62, and *Warrington v. Furber* (1807), 8

East, 242, were distinguished.

(*h*) At pp. 381—383 of the report.

to the party who paid him the notes that the bankers had become insolvent, and that he, the plaintiff, would resort to the defendant for payment of the notes; and it would then have been for the defendant to consider whether he could transfer the loss to any other person, for unless he had been guilty of negligence, he might perhaps have resorted to the person who paid him the notes. That party would, however, be discharged if he received no notice of non-payment, or of the insolvency of the bankers till a week after he had paid them to the defendant. The neglect, therefore, on the part of the plaintiff to give to the defendant notice of the insolvency of the bankers, may have been prejudicial to the defendant. The law requires that the party on whom the loss is to be thrown should have notice of non-payment, in order to enable him to exercise his judgment whether he will take legal measures against other parties to the bill or note. Now here, if the notes had been returned on the Tuesday to the defendant, he might have taken steps against the bankers, and he had a right to exercise his judgment whether he would do so or not, although they had stopped; or he might have had a remedy against the person who had paid him the notes" (i).

But an offer to return the notes, if made in reasonable time, may take the place of presentment at the bankers', so as to preserve the rights of the party who has received them in payment (k). And where the banker was insolvent at the time the notes were delivered, an offer to return them, if made within a reasonable time after discovery of the fact of the banker's insolvency, will be sufficient, although not made before the expiration of the time for presentment (l).

Changing for Favour.—In *Rogers v. Langford* (m), on the 23rd November, A. bought goods from B., which he paid for in country bank-notes. On Monday, the 28th, B. requested A.'s servant, as a favour, to exchange the notes for money, which he accordingly

(i) See the discussion of this case in *Guardians of Lichfield Union v. Greene*, at p. 528, *supra*.

(k) See *Henderson v. Appleton* (1827), *Chitty on Bills*, 11th ed. p. 259, note (u), approved in *Rogers v. Langford* (1833),

1 C. & M. 637, at p. 642; and followed in *Turner v. Stones* (1843), 1 D. & L. 122; 12 L. J. Q. B. 303.

(l) *Robson v. Oliver* (1847), 10 Q. B. 704.

(m) See note (k).

did. On the same day the bank stopped payment. A. heard of it on Tuesday, and on Wednesday wrote to B., informing him of the failure of the bank, and desiring him to exchange the notes; but the notes were not produced or tendered to B. until long afterwards, nor were they ever presented at the bank. In an action brought by A. against B. to recover the value of the notes, it was held that A. was not entitled to recover.

"I think," said Bayley, B., "the notes ought to have been either presented by the holder to the bank for payment, or else to have been returned without delay to the defendant, so as to have given him an opportunity of getting payment for them, or of making the best of them."

In *Turner v. Stones* (*n*), on Saturday evening, the 19th January, the plaintiff gave change for a 5*l.* bank-note of Messrs. P. & Co.'s bank to the defendant, at his request. On Monday morning, the banking-house was open for two hours and then closed, and the partners afterwards became bankrupt. No payments were made, and the jury gave an opinion that if the note had been presented, it would not have been paid. The note was not in fact presented, but on Monday the plaintiff sent it to the defendant, and requested to have his money returned. The defendant at first promised to return it, but afterwards refused. It was held that the obligation on the holder of a note in such a case is to give prompt notice, to the person from whom he received it, of the stoppage of the bank, and to tender the note back to him; and that the plaintiff had done all that he was bound to do and was entitled to recover.

Payment by Customer to Banker.—In *Timmins v. Gibbins* (*o*) M. W. deposited (with other funds) certain country bank-notes, payable in London, of 65*l.* nominal value, with a banking company and received the following memorandum signed by the manager: "Received of M. W. 80*l.*, for which we are accountable. 80*l.* at 3*l.* per cent. interest, with fourteen days' notice." The notes were sent on the same evening by post to the London agents of the banking company, and were presented on the next day, and refused payment. They were re-transmitted by that night's post to the banking com-

(*n*) (1843), 1 D. & L. 122; 12 L. J. Q. B. 303.

(*o*) (1852), 18 Q. B. 722; 21 L. J. Q. B. 403.

pany, who on the following day gave notice of dishonour to M. W. and tendered to him the notes, which he refused. It turned out that the bank which had issued the notes had stopped payment upon the day when M. W. made the deposit with the banking company, but that neither M. W. nor the banking company were then aware of this. It was held that M. W. could not maintain an action, either for money lent or for money had and received, against the banking company.

“There was,” said Lord Campbell, C. J., “a complete failure of the consideration upon which the defendants’ promise was founded. . . . It is impossible here to say that there was any sale. All that was intended was a deposit to be repaid, not immediately, but on fourteen days’ notice. No money was, in truth, deposited, but only this security which has turned out to be worthless. The proposition contended for cannot be supported, that there is any general rule that where bank-notes are paid they are always paid at the risk of the party receiving them, except where they are paid in respect of an antecedent debt.”

CHAPTER II.

BANKERS' DRAFTS.

Bank Post Bills.

BANK post bills are bills payable to order (at seven or sixty days, according to the present practice), used for convenience in remitting small or odd sums of money. They are issued accepted, and, accordingly, are practically equivalent to promissory notes (*a*).

At the present time they are, in fact, issued in this country by the Bank of England only.

Nature.—In *Forbes v. Marshall* (*b*) the document in question was in the following form :—

“No. 445. Union Bank Post Bill.

Calcutta, 1st July, 1847. Company's rupees 10,000. At sixty days after sight of this our first bill of exchange, second and third of the same tenour and date not paid, we promise to pay on account of the proprietors of the Union Bank of Calcutta, to the order of Messrs. Cockerell, Larpent & Co., the sum of Co.'s rup. 10,000, ten thousand, value received.

(Signed) J. RENIER, }
W. P. GRANT, } *Directors.*”

“These instruments,” said Pollock, C. B., “are either bills of exchange or promissory notes. I am rather inclined to regard them as bills of exchange. Indeed, the operation of a bank post bill is similar to that of a bill of exchange.” Baron Martin said : “It is an approved mode of doing business, and has been in use by the Bank of England for a century at the least, and is a most beneficial practice. The document is payable to order ; it enables

(*a*) See Byles on Bills, 16th ed. p. 111.

(*b*) (1855), 24 L. J. Ex. 305. ”

a debt due at a distance to be paid by means of it, and is, in fact, as good as money" (c).

Tender.—A tender in bank post bills will be effective if it is not declined on the ground that it is made in that form (d).

Payment.—If accepted without objection, they will amount to payment (e).

Title of Holder.—In *Strange v. Wigney* (f) the plaintiff had left in a hackney-coach in London her reticule containing a 100*l.* bank post bill, indorsed in blank. She issued handbills proclaiming her loss. The defendant, a banker at Brighton, who had not heard of the loss, cashed the bill for a stranger eight days afterwards. The stranger on being asked his name said he was on a journey, and wrote on the bill a fictitious address in an illiterate hand. The defendant did not inquire at what inn he was staying. It was held that the defendant was liable for the amount to the plaintiff (g).

Bills of Exchange.

We have seen that there are certain statutory limitations upon the right of bankers with regard to the drawing and acceptance of bills of exchange (h).

Subject to these restrictions, a banker drawing or accepting a bill, whether it is drawn upon, or by, another banker, or any other person, is in the same position as an ordinary drawer or acceptor, as the case may be.

Drafts between Offices of One Bank.

A banker's draft, addressed to the head office and signed by the manager of a branch, as such, requiring the head office to pay on demand, on account of the branch, a sum of money to the order of a specified person, cannot be treated by the bank as a bill of

(c) Cf. *Willis v. Bank of England* (1835),
4 A. & E. 21.

(d) *Tiley v. Courtier* (1817), 2 C. & J.
16, note (c).

(e) *Caine v. Coulton* (1863), 1 H. & C.
764.

(f) (1830), 6 Bing. 677.

(g) Cf. pp. 502—504, *supra*.

(h) See pp. 345, 515, *supra*.

exchange, or cheque, within the meaning of sects. 3, 60 or 82 of the Bills of Exchange Act, or within sect. 17 of the Revenue Act, 1883 (46 & 47 Vict. c. 55) (*i*).

But such a draft is within sect. 19 of the Stamp Act, 1853 (16 & 17 Vict. c. 59); so that a banker paying it in good faith to a holder claiming under a forged indorsement is protected (*i*). Probably this is so even where the draft is drawn abroad on this country, as well as in the case of an inland draft; but this is not settled (*k*).

The holder of such a draft may treat it either as a bill of exchange or a promissory note (*l*).

The subject of payments between separate offices of the same bank is dealt with above at pages 83 and 84.

(*i*) *Capital and Counties Bank v. Gordon*, [1903] A. C. 240.

(*k*) See Lord Lindley's speech in the case last cited, at p. 251, and the judgment of Bigham, J., in *Brown, Brough &*

Co. v. National Bank of India (1902), 18 T. L. R. 669.

(*l*) Per Lord Lindley in the case cited in note (*i*), at p. 250, referring to sect. 5 (2) of the Bills of Exchange Act.

CHAPTER III.

DEPOSIT RECEIPTS.

Nature and Effect.

A DEPOSIT receipt binds the banker to repay the sum of money referred to in it to the person named therein or according to his instructions (a).

It is not, however, necessarily conclusive in favour of the customer, if the amount has not been actually received by the banker, as, for example, if bank-notes paid in by the customer prove worthless (b).

Not Negotiable.—It is not a negotiable instrument. Accordingly, though the right of the depositor against the banker can be assigned or bequeathed, the banker will not effectually discharge his obligation by payment in good faith and without notice of anything wrong to a person presenting the receipt indorsed by the depositor if in fact he had no right to receive the money.

But apparently the depositor might be estopped by negligence on his part if it induced the banker to pay a person not entitled (c).

In *Pearce v. Creswick* (d) George Hurst had taken two receipts, each of which, except as to the number, was in the following form:—

“No. 721. Sheffield and Rotherham Bank,

“Sheffield, August 18, 1837.

“Received of Mr. George Hurst the sum of one hundred pounds, to be accounted for.

“For the Sheffield and Rotherham Banking Company,

“£100.

W. BROWN.”

(a) As to the nature of a deposit account, see pp. 195, 196, *supra*.

(b) See *Timmins v. Gibbins*, cited at p. 532, *supra*.

(c) Cf. pp. 257—264, 275—276, and 278—282.

(d) (1843), 2 Hare, 286.

George Hurst died on the 21st January, 1838. On the 1st February a nephew, also named George Hurst, who disputed the will of his uncle, produced the receipts to Eyre, an innkeeper at Worksop, and Eyre presented them for payment at the Worksop branch of the Nottinghamshire Bank, where he was told by a clerk of the bank that if the receipts were indorsed by George Hurst they would cash them. Eyre then took the receipts to George Hurst, the nephew, who indorsed them with the name "George Hurst"; and on Eyre presenting them to the Worksop Bank the second time, so indorsed, the Worksop Bank, not being aware that there were two persons named George Hurst, or that the George Hurst to whom the receipts had belonged was dead, paid Eyre the 200*l.* and took the receipts. On the 3rd of February the amount of the receipts so paid was in the course of business charged by the Nottinghamshire Bank to their London bankers, to whom they were remitted; and on the 5th of February, the same London bankers were directed by the Sheffield and Rotherham Bank to give the Nottinghamshire Bank credit for the amount paid, and the receipts were delivered up to the Sheffield and Rotherham Bank, and cancelled, by tearing off the signature at the foot. On the 8th February, 1838, the solicitor of the principal beneficiary under the will applied to the Sheffield and Rotherham Bank on the subject of the receipts. After a contest in the Ecclesiastical Court, letters of administration with the will annexed were granted to the plaintiff on the 21st November, 1839.

Vice-Chancellor Wigram decreed payment to the plaintiff by the defendants, who were sued as director and public officer of the bank, of the amount expressed in the receipts with interest and costs.

In giving judgment his Honour said: "The testator was a creditor of the Sheffield and Rotherham Bank at the time of his death; and the debt has not been paid to his executor, or to any person lawfully claiming under him. . . . The defendants do not pretend that the receipts were transferable in the sense that the holder was entitled to demand payment. They do not set up any usage or custom of such a kind, but they merely insist that it is, in the course of business, the practice of the bank to pay the amount of the receipts to any respectable party presenting them; or, in other words, they ascertain, or endeavour to ascertain, by a

fact extraneous to the mere possession of the instrument,—namely, the respectability of the party,—that he is entitled to require payment. The Nottinghamshire Bank acted on this practice,—they took the precaution of having the receipts indorsed; but they were defrauded by the parties to whom they paid the money. I cannot say that there is anything in such circumstances which has, in equity, absolved the defendants from their original liability to pay the debt of which the receipts are evidence.”

In *Cochrane v. O'Brien* (*e*) John O'Brien had lodged 130*l.* in a bank in his own name upon a deposit receipt. Afterwards his son Daniel, by his direction, lodged an additional sum of 5*l.* in the bank, and obtained a new deposit receipt for 135*l.* in the name of his sister Catherine, the old receipt being cancelled. John O'Brien having died, Daniel, as his administrator, claimed the money, alleging that the gift to Catherine was incomplete, and that he had taken the receipt in her name without his father's directions. He refused to hand her the deposit receipt, and required the bank to pay the money to him. Catherine also demanded the money of the bank. Both of them commenced actions against the bank. It was held that the bank was not entitled to relief by way of interpleader (*f*).

In the course of his judgment, Lord Chancellor Sugden said: “It appears to me that, after cancelling the old receipt and accepting the 5*l.*, and giving a new receipt for the 135*l.* in Catherine's name, the bank became her debtors in that sum, and were not at liberty to resist her demand, or to treat the case as one of interpleader, because John's administrator, the very person who made the new deposit and took the new receipt, chose to claim the fund, or, in other words, to rescind the whole transaction. It would not be inconsistent with this view that John's representative might still be able to recover against the bank; but it is their own fault if they created a new liability in themselves without obtaining a sufficient discharge from the original title. This is not the case of a double demand for one duty, but it is a case in which there may be two liabilities. It does not appear to me that this can be con-

(*e*) (1845), 2 J. & L. 380; 8 Ir. Eq. R. 241.

(*f*) Interpleader proceedings are now regulated by Ord. 57 of the Rules of the Supreme Court.

sidered as a case of an imperfect gift. . . . The bank appear to consider that they have an equity because Catherine could not deliver up the receipt; but if they are right she could not maintain her action. I should render deposit receipts of little value if I were to sustain this bill; and the bank would find it necessary to adopt some other plan."

In *Moore v. Ulster Bank* (*f*) M., shortly before his death, had indorsed a bank deposit receipt and delivered it to S., stating that it was for his (M.'s) niece, K. S. indorsed the document, and, after M.'s death, presented it to the bank, who transferred the amount to S. without having had notice of M.'s death. In an action by the administratrix of M. against the bank, it was held (1) that the deposit receipt was not a negotiable instrument passing by indorsement; (2) that there was no equitable assignment of it; (3) that if the transaction constituted S. an agent of M. his authority was revoked by M.'s death; and (4) that the transaction did not amount to a *donatio mortis causâ*.

May, C.J., in the course of his judgment, said: "A deposit receipt is not a negotiable instrument (*g*), such as a promissory note or a bill of exchange, capable of being transferred by indorsement. It is merely an acknowledgment of the bank that it holds a certain sum to the use of the depositor. The holder, by merely writing his name on the document and delivering it to another, confers no legal right on the person to whom he gives it."

Where the terms of a deposit receipt are that the money to which it refers shall be accounted for to the depositor, or anyone authorized by him to receive the same, with interest, on production and delivery up of the deposit receipt, with a receipt indorsed thereon by him, the banker is not necessarily safe in paying the amount to a stranger, although the receipt is indorsed by the depositor. That indorsement does not amount to an authority to receive the money, but is only a form of receipt (*h*).

But in *Woodhams v. Anglo-Australian, &c. Assurance Co.* (*i*) a

(*f*) (1877), 11 Ir. R. C. L. 512.

(*g*) In the United States of America it has been held that a deposit receipt stating that the amount is payable to the depositor or his order is negotiable:

Miller v. Austen (1851), 13 How. 218.

(*h*) *Evans v. National Provincial Bank of England* (1897), 13 T. L. R. 429.

(*i*) (1861), 3 Giff. 238; 8 Jur. N. S. 148; 5 L. T. N. S. 628.

director of an insurance company, who was indebted for calls, had delivered a deposit note of the company to the plaintiff for value, and without notice of any defect of title thereto. It was held that the company were liable to the plaintiff on the note, and that they could not set-off against him the amount due from the director for calls.

Vice-Chancellor Stuart, in the course of his judgment, said: "A deposit note for money, like a deposit note for goods, passes by delivery of the instrument, and requires no assignment."

The fact that it is provided on the deposit receipt that the depositor must sign a cheque on the back of the receipt when the money is withdrawn does not alter the nature of the transaction between the banker and the customer, which remains a deposit of money, repayable on demand (*k*).

Payment into Court.—Where there are conflicting claims to a sum deposited with a banker, but neither is made under an absolute assignment in writing, the banker is not entitled under sect. 25 (6) of the Judicature Act, 1873 (36 & 37 Viet. c. 66), to pay the sum into Court (*l*).

Gift Inter Vivos.

The indorsement and delivery of a banker's deposit receipt, with the intention to make a gift, operates as a good equitable assignment of the amount on deposit at the bank. If the gift of such a fund were incomplete, the appointment of the donee as executor of the donor might perfect the gift upon the death of the latter (*m*).

Donatio Mortis Causâ.

Money standing upon a deposit account can be effectually disposed of by way of a *donatio mortis causâ*.

In *In re Dillon, Duffin v. Duffin* (*n*), the facts were as follows: James Dillon was holder of a deposit note of the London and

(*k*) See the judgment of Cotton, L. J., in *In re Dillon, Duffin v. Duffin*, cited at p. 543, *infra*.

(*l*) *In re Sutton's Trusts* (1879), 12

Ch. D. 175. Cf. *In re Kelcey, Tyson v. Kelcey*, [1899] 2 Ch. 530.

(*m*) *In re Griffin, Griffin v. Griffin*, [1899] 1 Ch. 408; 79 L. T. 442.

(*n*) (1890), 44 Ch. D. 76.

Westminster Bank, Lambeth branch, for 580*l.*, the material part of which was as follows:—

“Received from Mr. James Dillon Five hundred and eighty pounds to the credit of his deposit account.

“For the London and Westminster Bank,

“A. T., *pro* Manager.

“This deposit receipt is not transferable. The amount is repayable on demand, but will bear no interest unless it remains undisturbed for one month. The rate of interest is subject to alteration, of which notice will be given by advertisement in the *Times* newspaper. When the money is withdrawn or the interest paid the depositor must sign the cheque on the back hereof, first affixing a penny stamp. If part only is withdrawn a new receipt will be given for the balance.”

On the back of the note was a form of cheque:—

“To the London and Westminster Bank, Limited.

“Lambeth Branch.

“188 .

“Pay to self or bearer and interest.”

On the 9th January, 1887, James Dillon made his will, of which he appointed Emma Duffin an executrix. In the will he made certain bequests to her. On the 11th January, 1888, the testator, who was a widower without children, was taken ill, and Emma Duffin, who was his sister-in-law, went to attend to him. Her evidence, which was believed, was to the effect that the testator took the deposit note out of his chest, and said, “I am going to give it to you conditionally. If I get well, you will give it me back; if not, you are all right;” that he then filled up the cheque by inserting the date and amount—580*l.*—adding the word “bearer” after “self or bearer,” and signed it upon a 1*d.* stamp and gave it to her, saying, “Now, you understand, if I get well you’ll give it me back; and if not, it will be all right.”

It was held that there had been a valid *donatio mortis causá*, for that, assuming a drawer of a cheque cannot make a *donatio mortis causá* of the cheque if not presented in his lifetime, the intention in the case before the Court had been not merely to give the cheque but the deposit note; that a deposit note is a good subject

of a *donatio mortis causâ*, and that the gift was not defeated by the giving of the cheque along with the note.

"I was surprised," said Lord Justice Cotton, in the course of his judgment, "to find that no evidence was brought forward on either side as to what was the practice of the London and Westminster Bank or of any other banks which put a memorandum of this kind on their deposit notes, or why they put it there. In the absence of such evidence, I come to the conclusion that, in order to preserve convenient evidence when the money is withdrawn, they put the form of cheque on the note, so that when filled up and signed it may be preserved as a receipt, and not that they make it a part of the bargain that they will not pay unless this cheque is signed and produced. If the document was lost they would require some explanation why it was not forthcoming before they paid the money; but I do not think that they could refuse to pay. I cannot think that the requiring this cheque to be signed puts the account on any footing different from that of an ordinary deposit account, so as to prevent the fund from being given away as a *donatio mortis causâ*" (o).

Bequests.

Money placed on deposit, the note being in the form, "Received of A. B. one hundred and fifty pounds to account for on demand," was held not to pass under a bequest of "all bonds, promissory notes, and other securities for money in my hands at the time of my decease, and all moneys due thereon," but to pass under a residuary clause (p).

Statute of Limitations.

The depositor is entitled to have his money back only when he has given the agreed notice, if any, or otherwise demanded pay-

(o) Cf. *In re Mead, Austin v. Mead* (1880), 15 Ch. D. 651, which was distinguished in the case cited above; and see also *Macdonald v. Macdonald* (1889), 16 Sc. Sess. Cas. 4th ser. 758; *In re Weston, Bartholomew v. Menzies*, [1902] 1 Ch. 680, in which last case it was held that a Post Office Savings Bank book could,

but building society share certificates could not, be the proper subject-matter of a *donatio mortis causâ*.

(p) *Hopkins v. Abbott* (1875), 19 Eq. 222. But this case seems of very doubtful authority: see the comments upon it at p. 196, *supra*. As to the subject of bequests, see pp. 230, 501, *supra*.

ment. Accordingly, until then, time does not begin to run under 21 Jac. 1, c. 16, s. 3 (q). It is, apparently, otherwise as to money on a current account (r).

Valuation for Death Duty.

In a statement of a testator's estate under sect. 97 of the Administration and Probate Act, 1890, of Victoria, it was held by the Judicial Committee that bank deposit receipts should be valued at the price which they would fetch in the market, and not according to the amounts appearing on the face of them to be payable (s).

Deposits by Trustees.

As to this subject, reference should be made to Part III. Chap. 3, and to Part VII. Chap. 2.

Stamp Unnecessary.

A receipt given for money deposited in any bank, or with any banker, to be accounted for and expressed to be received of the person to whom the same is to be accounted for, does not require any stamp (t).

Forgery.

In *Reg. v. Atkinson* (u) it appeared that a person named John Mann, in the month of June, 1839, had deposited the sum of 85*l.* in the hands of Jonathan Backhouse and others, who constituted

(q) *In re Tidd*, *Tidd v. Overell*, [1893] 214.
3 Ch. 154; *Atkinson v. Bradford*, &c. *Building Society* (1890), 25 Q. B. D. 377. See, however, *Way v. Bassett* (1845), 5 Hare, 55; but the reasoning in this case does not apply to deposit receipts in the form which is now most common.

(r) But see p. 140, *supra*. Cf. also pp. 195, 196, *supra*.

(s) *Master in Equity of Supreme Court of Victoria v. Pearson*, [1897] A. C.

(t) Stamp Act, 1891, Schedule, "Receipt," Exemption (1). In view of the terms of sect. 101, apart from the express exemption, the decision in *Tomkins v. Ashby* (1827), 6 B. & C. 541, would not now be operative. Cf. *Sibree v. Tripp* (1846), 15 M. & W. 22, at p. 37.

(u) (1843), 2 Moo. C. C. 278; 1 Car. & M. 325. See also *Reg. v. Johnston* (1851) 5 Cox, C. C. 133.

the Darlington Bank at Stockton, and that on that occasion he received from the bank an accountable receipt in the following form:—

“ This receipt not transferable. ”	No. F. 266, Darlington Bank, Stockton, 12th 6 M, 1839.
	Received of John Mann, Eighty-Five Pounds, to his credit.
	For Jonathan Backhouse & Co. Frederick Backhouse.
	£85 Entered, F. B.
	”

In October, 1840, the prisoner, having this receipt in his possession, went to the bank and, representing himself to be John Mann, therein mentioned, wrote the words “John Mann” on the face of the receipt and delivered it to the bankers, who paid him the sum of 87*l.* 17*s.* 6*d.*, being the amount mentioned in the receipt with interest. It appeared that interest, by the course of dealing between the bankers and their customers, was payable on their accountable receipts, and that the bankers, on having a receipt delivered back to them with the name of the party who had deposited written upon it by him, treated it as an order for the payment of the amount deposited, with the interest then due, and paid such amount and interest accordingly.

The prisoner was held rightly convicted upon an indictment for forging and uttering a “warrant and order for the payment of money, to wit, a warrant and order for the payment of 85*l.*” and for forging and uttering an “acquittance and receipt for money, to wit, for 85*l.*” (x).

Reference should be made, in connection with the subject of this chapter, to “Deposit Account,” at pp. 195—196, above.

(x) See Forgery Act, 1861, s. 23, cited at p. 328.

CHAPTER IV.

LETTERS OF CREDIT.

Form and Nature.

"A LETTER of credit (sometimes called a bill of credit) is," says Story (*a*), "an open letter of request, whereby one person (usually a merchant or a banker) requests some other person or persons to advance moneys, or give credit, to a third person named therein, for a certain amount, and promises that he will repay the same to the person advancing the same, or accept bills drawn upon himself, for the like amount. It is called a general letter of credit when it is addressed to all merchants or other persons in general, requesting such advance to a third person; and it is called a special letter of credit when it is addressed to a particular person by name, requesting him to make such advance to a third person" (*b*).

When a London banker accepts bills of exchange drawn by a country banker or a foreign correspondent, he usually does so in pursuance of the terms of a letter of credit previously given to the drawer stating the aggregate amount to be drawn under it, the currency of the drafts, and the period for which it holds good.

Documentary Credit.—Where the banker only engages to accept drafts against documents of title to goods, the letter of credit states the particulars of the merchandise in respect of which the bills are to be drawn; and it is customary to present the drafts for acceptance with the bills of lading, invoices, and insurance policies attached.

(*a*) Bills of Exchange, § 459.

(*b*) Cf. note (*a*) on p. 112 of 4 Macq. H. L. C.

Open (or Clean) Credit.—Where the draft is to be accepted without documents of title attached the credit is said to be clean.

Not Negotiable.—A letter of credit is not a negotiable instrument. The person presenting it is not necessarily the person entitled to make the draft, and, accordingly, the bankers to whom it is addressed ought to see that the signature to the draft is genuine. If they do not, the loss will be theirs: payment of a forged draft being no payment as between the person paying and the person whose name is forged (c).

Possession of the letter of credit by the person to whom it is addressed does not prove that the payment which it authorized has been made. To show this, there must be a draft by the person in whose favour the letter of credit was given (c).

When, for a sum paid down, a banker grants a letter of credit, he must show that it has been complied with or pay back the money (c).

Position of Third Party.

Rights against Banker.—A person who, in reliance upon, and in accordance with the terms of, a letter of credit, has given credit to the holder, is entitled to resort to the banker who has signed the letter, and is not affected by the state of the accounts between him and his customer.

In *In re Agra and Masterman's Bank, Ex parte Asiatic Banking Corporation* (d), Agra and Masterman's Bank had given to Dickson, Tatham & Co. a letter of credit addressed to them in the following terms:—

“No. 394. You are hereby authorized to draw upon this bank at six months' sight to the extent of 15,000*l.* sterling, and such drafts I undertake duly to honour on presentation. This credit will remain in force for twelve months from this date, and parties negotiating bills under it are requested to indorse particulars on

(c) *Orr v. Union Bank of Scotland* (1854), N. S. 587; 4 L. T. 162; 9 W. R. 1 Macq. H. L. 513; 2 C. L. R. 1566; 581.
British Linen Co. v. Caledonian Insurance Co. (1861), 4 Macq. H. L. 107; 7 Jur. 222; 15 W. R. 414. (d) (1867), 2 Ch. 391; 36 L. J. Ch.

the back hereof. The bills must specify that they are drawn under credit, No. 394, of the 31st of October, 1865."

Dickson, Tatham & Co. drew bills under this letter to the amount of 6,000*l.*, and indorsed them to the appellant, who duly indorsed particulars on the letter of credit. The bank was afterwards wound up, and Dickson, Tatham & Co. were indebted to the bank to an amount exceeding what was due on the bills. It was held that the letter constituted a contract to the benefit of which all persons taking and paying for bills on the faith of it were entitled, without regard to the equities between the bank and Dickson, Tatham & Co., and that the appellant was entitled to prove for the amount due on the bills without regard to the state of the account between the bank and Dickson, Tatham & Co.

"It is plain," said Lord Justice Turner, "that this letter was given by the bank with a view to its being shown to persons who were to negotiate the bills, and to make advances upon the faith of the letter; and the last passage contains these words: 'Parties negotiating bills under it are requested to indorse particulars on the back hereof.' It is plain that this part of the letter is in truth addressed to the person by whom the bills were to be negotiated. The whole effect of the letter is, that the Agra Bank held out to the persons negotiating the bills a promise that it would pay the bills; and it would be impossible . . . to allow the bank, after having sent that letter into the world, addressed to the persons who were to negotiate the bills, and so held out to them that it would be answerable for their payment, to say that because there was a debt due to it from the persons to whom it had given the letter of credit, therefore it would not pay the bills. . . . I think that there clearly is a perfectly good equity to sustain a bill filed by any one of the persons by whom bills drawn under the letter of credit had been negotiated to compel the Agra Bank to accept and pay these bills which were taken and paid for upon the faith of the statement which was made in the letter."

Lord Justice Cairns put the matter thus: "The essence of this letter is, as it seems to me, that the person taking bills on the faith of it is to have the absolute benefit of the undertaking in the letter, and to have it in order to obtain the acceptance of the bills which are negotiable instruments payable according to their tenor, and

without reference to any collateral or cross claims. Unless this is done the letter is useless: Dickson, Tatham & Co. obtain no benefit from it; the takers of the bills obtain no protection under it."

In *Maitland v. Chartered Mercantile Bank of India, London, and China* (e), the credit was in the following form:—

No. 39.

Credit for £2,000 sterling, in duplicate, 4907.

11325 National Bank of Scotland,
Edinburgh, 24th June, 1864.

To Messrs. Fletcher and Company,
China.

I hereby, for the National Bank of Scotland, authorize you to draw the annexed Bill of Exchange at six months' sight for two thousand pounds sterling on Messrs. Glyn & Co., bankers, in London, who will honour the same in conformity with its tenor, if presented, along with this letter of credit, within one year from this date.

(Signed)—

THOMAS ANDERSON, *Secretary*.

JNO. J. SHEARER, *P. Manager*.

First of Exchange for £2,000 sterling,
No. $\frac{39}{4907}$ F.

Place and date of drawing, Shanghai,
5th April, 1865.

Six months after sight pay this first of Exchange (second of the same tenor and date not being accepted or paid), to our order, the sum of *Two thousand pounds sterling*, which charge to the National Bank of Scotland, as per annexed Letter of Credit.

To Messrs. Glyn & Co.,
Bankers, London.

Drawer signs here, *Fletcher & Co.*

Vice-Chancellor James held that a *bonâ fide* holder of the bill drawn under this letter, and taken by him on the faith of it, had a right of action against the grantor of the letter, upon his refusal to accept the bill; and that an arrangement between the grantee and his surety restricting the right of the former to draw the bill, even although such an arrangement might have been usual under the circumstances, would not affect the position of a *bonâ fide* holder for value.

So a person who acts upon a letter of credit in accordance with the intention of the giver of the letter, may rely upon it, although it is not, in terms, addressed to him, or to people in general.

In *Union Bank of Canada v. Cole* (f) Brett, L. J., observed: "It

(e) (1869), 38 L. J. Ch. 363 (see also 2 H. & M. 440; 12 L. T. 372).

(f) (1877), 47 L. J. C. P. 100.

is said, on the part of the defendants, that the document could not be an open letter of credit, because it is addressed only to Stevenson, and not to people at large. But I cannot go so far as to say that no document could be an open letter of credit if addressed to an individual. If that which is asserted to be a letter of credit is addressed to all the world, then those who act upon it have, in fact, the advantage of an actual legal contract with the giver of the letter—an actual contract, either because it was intended by the giver of the letter that they should act upon it, or because he has so acted that persons dealing with him would have a right to infer that he so intended. Then, whether he intended it or not, on ordinary principles of law, he becomes bound. That establishes a privity between the persons giving the letter and the persons acting upon it, and on ordinary principles creates a contract at law. But it does not follow that where the letter is not addressed to the public there may not arise a contract between the person who acts upon and the person who signs the letter. If the person in whose favour the bill is to be drawn has some authority given to him—*e.g.*, if an express authority in writing can be proved to have been given, and acted on—then there is a contract between the person who has signed the letter and the person who has acted upon it, to the same extent as if the letter had been addressed in terms to the party so acting. If we could properly have inferred from the case that the defendants really intended the plaintiffs to act on the letter, then there would be a contract between them.”

No Right to Specific Fund.—A writing opening a credit for a particular sum cannot, of itself, constitute an equitable assignment or specific appropriation of that sum so as to create a trust. It is a mere statement that the person opening the credit will act as paymaster to the person to whom the writing is addressed up to a certain amount, on his performing the conditions set forth in it.

In *Morgan v. Larivière* (g) the respondent had entered into a contract with the French Minister of War, represented by M. Joulin, his delegate in London, to supply 20,000,000 of ball-cartridges of a certain quality. Larivière desired some arrangements to be made as to payment. Morgan and Gooch, who acted

in London as financial agents for the French Government, wrote a letter to him as follows: "We are instructed by M. Joulin to advise you that a special credit of 40,000*l.*, equivalent to one million of francs, has been opened with us in your favour, and that it will be paid to you rateably, as the goods are delivered, upon receipt of certificates of reception, issued by the French Ambassador or by M. Joulin. We shall require receipts in duplicate for the payment or payments as made, and the surrender of this letter on the final payment under it being made." Disputes having arisen as to whether the respondent had become entitled to payment under the contract, he sought to have the appellants declared trustees for him of the 40,000*l.* It was, however, held that the letter did not constitute Messrs. Morgan and Gooch trustees for him as to the sum named, nor constitute an equitable assignment as of a fund in their hands, and that consequently the matter was not one for the exercise of the jurisdiction in Chancery.

"I read this letter," said Lord Cairns, "as being nothing more than this: a statement by bankers to a tradesman who supplies goods to a customer of the bankers that they, the bankers, on behalf of their customer, will act as paymasters to the tradesman up to a certain amount of money; but that, in order to call upon them to act as paymasters, he, the tradesman, must bring with him a certain certificate showing that the goods have been delivered to their customer. In a transaction of that kind there is nothing of equitable assignment, there is nothing of trust; and it appears to me that any banker who had given an undertaking of that kind would be very much surprised to find that it was held that a certain portion of the funds of his customer in his hands had been impressed with a trust, had been equitably assigned, and had, in fact, ceased to be the moneys of the customer, and had become the moneys of the tradesman who was to supply the goods" (*l.*).

Conditional (or Documentary) Credit.—In *Brazilian and Portuguese Bank v. British and American Exchange Banking Corporation* (*i.*), by the terms of a letter of credit, the defendants undertook to accept bills to a certain amount upon the following, amongst other, con-

(*h.*) See also *In re Barned's Banking Co., re Suse*, cited at pp. 554—556, *infra*.
Banner v. Johnston, and *Ex parte Dever*, In (*i.*) (1868), 18 L. T. 823.

ditions, viz., that the bills were to be for the invoice cost of coffee to be shipped from Rio to New York, Philadelphia, or Baltimore, and that all the bills of lading issued, except one to be forwarded by the vessel to the defendants at New York and the one retained by the captain of the vessel, were to be forwarded direct to the defendants in London. The plaintiffs had purchased or cashed a bill purporting to be drawn under the letter of credit. But it appeared that one of the bills had been retained by them; and also that, in the bills of lading, the vessel was stated to be bound for St. Thomas for orders, one bill of lading being sent to the defendants with a letter of advice stating that the coffee was shipped to St. Thomas for orders for either New York, Philadelphia, or Baltimore. It was held that the conditions in the letter of credit on which the defendants had engaged to accept bills of exchange were unperformed, and consequently that the obligation to accept had never attached.

In *Union Bank of Canada v. Cole* (*k*), upon a special case stated, it appeared that documents in the form of letters of credit, had been addressed by the defendants to S. & Company, corn merchants, authorizing them to draw bills on the defendants against shipments of grain. To the documents certain conditions were appended. S. & Co. drew bills upon the defendants under the credit so opened without performing the conditions. The plaintiffs, having notice of the conditions, and knowing that they were unfulfilled, advanced money on the bills so drawn, which the defendants refused to accept. In an action against the defendants for not accepting the bills it was held that, if the documents created a contract between the plaintiffs and defendants, that contract was subject to such of the conditions as were not necessarily subsequent to the advance.

In the case of *The Chartered Bank of India, Australia and China v. Macfadyen & Co.* (*l*) the defendants, merchants in London, issued to Knowles & Co., commission agents in Batavia, a letter of credit, in which they said: "We . . . open . . . the following extended credit for 5,000*l.* (five thousand pounds), to be availed of by drafts on us at 3, 4 or 6 months' sight, against produce bought and paid for by you, but not immediately ready for shipment, but to be shipped within two months of the passing of the drafts and documents in

(*k*) See p. 549, *supra*.

(*l*) (1895), 64 L. J. Q. B. 367; 1 Com. Cas. 1.

full cover of same, to be sent in to the bank through whom you negotiate for despatch to us by first mail after receipt. On the shipping documents being handed to the bank, the amount so covered shall again be available, provided that in no case shall the amount uncovered current at any one time exceed the sum of five thousand pounds sterling. The produce bought under this credit you must hold under lien to us until the documents have been handed to the bank for transmission to us. . . . These are the terms on which we grant this credit, and we hereby undertake to accept on presentation, and pay at maturity, or take up under discount all drafts drawn by you in conformity with the said terms and conditions." Knowles & Co. presented the letter of credit to a banking company, and through them negotiated bills drawn on the defendants without having purchased produce.

Mr. Justice Mathew held that the letter did not constitute an open credit; but that, before being entitled to draw on the defendants, Knowles & Co. must have bought and paid for produce, and that, as between Knowles & Co. and the defendants, if the latter became aware that no purchase of goods had been made by the former, they were entitled to refuse to accept the bills. Accordingly, the plaintiff bank, having been misled in discounting the bills, could not recover their amount from the defendants.

Stoppage of Bank.

Not in itself a Breach of the Contract.—In *In re Agra Bank, Ex parte Tondeur* (m), it was held that where a bank has issued a letter of credit on the terms that the bills which they agree to accept are to be covered by bills of lading to a like amount, suspension of payment by the bank before there has been time for the letter of credit to be used is not a breach or repudiation of contract. The bills of exchange, if accompanied by the bills of lading, might be accepted.

In *Ex parte Agra Bank, In re Barber & Co.* (n), the Agra and Masterman's Bank had granted a letter of credit to a company on the terms that the company should ship tea and forward bills of lading,

(m) (1867), 5 Eq. 160.

(n) (1870), 9 Eq. 725.

invoices, and policy of insurance on the tea to the bank, and should also draw on Barber & Co. bills to be accepted by them to an amount sufficient to cover the amount authorized by the letter of credit. Barber & Co. guaranteed the performance by the company of these terms, "holding themselves responsible for the same." The company drew on the bank, and the bank accepted the bills, but owing to the failure of the bank after the dates when the bills were drawn, and before they became due, the company shipped no tea, and did not perform any of the terms agreed on. All the bills were eventually paid. It was held that the failure of the bank was no reason why the company should not have performed its part of the contract, and that Barber & Co. were not relieved from their guarantee.

Application of Goods Consigned to Bank.—In *In re BARNED'S Banking Co., Banner v. Johnston* (o), Johnston, Pater & Co. were cotton merchants at Pernambuco. Attwool, who was in business at Liverpool, wished to obtain consignments of cotton from them, and as they desired security he obtained from BARNED'S Banking Co., at Liverpool, a letter of credit, by which they authorized the Pernambuco firm to draw on them "against cotton purchased in conformity with instructions." The drafts were to be "covered by shipping documents, say invoices and bills of lading of cotton addressed to this company, and forwarded under separate cover by the same mail which brings the drafts for acceptance, on receipt of which documents we engage to honour such drafts." Some shipping documents of cotton were sent, and some bills were accepted—one bill was accepted without any shipping documents being sent—and then, before the maturity of any one of these bills, the bankers became bankrupt, and bills arriving immediately afterwards were left unaccepted. An order to wind up the bank being made, Johnson, who was the agent of the Pernambuco firm and was also a partner in that firm, claimed to prove against the bankers for the whole amount of the bills, without bringing into account the value of the cotton which had been sold, or which remained in hand. It was held that he was only entitled to prove for the balance, the bankers being only debtors to the bill-holders

for the surplus remaining after the goods consigned had been applied to satisfy the acceptances, and not being trustees of the goods for the bill-holders.

"The order to send home the shipping documents, and the condition annexed to the promise to accept—that the shipping documents shall be sent to them—are," said Lord Cairns, "for the protection of the bankers and not, as it seems to me, in any way for the protection of the persons who negotiate the bills of exchange. . . . There is . . . no right whatever on the part of the persons who, in the Pernambuco market, took the bills of exchange, to do more than to require that the bankers here shall accept the bills; and, if they are accepted, the holders of the bills no longer have any security over the cotton; that cotton passes into the hands of the bankers themselves" (*p*).

In *Ex parte Dever, In re Suse* (*q*), bankers in London, at the request of M., who was acting as the agent in London of S., a merchant at Shanghai, on the 16th of March, 1883, granted to S. a letter of credit for 20,000*l*. The letter authorized S. "to draw on us four months' sight for any sums not exceeding 20,000*l*, such draft or drafts to be accompanied by bills of lading and invoices of tea, purchased according to order of M., and shipped by steamers to London, and marine insurance policies relating thereto, and these documents to be surrendered to us against our acceptances. And we hereby agree with you, and also as a separate engagement with the *bonâ fide* holders respectively of the bills drawn in compliance with the terms of this credit, that the same shall be duly accepted on presentation and paid at maturity, if drawn and negotiated on or before the 31st of December, 1883." It was agreed that a commission of 1 per cent. should be paid to the bankers on all drafts drawn under the credit, and M. agreed that he would meet all the acceptances on or before their due dates, "the usual rate of $2\frac{1}{2}$ per cent. being allowed on all pre-payments." Bills were drawn by S. under this credit against various parcels of tea consigned by him to M. for sale. In each case the bill mentioned the parcel of tea against which it was drawn, and purported to be drawn under the letter of

(*p*) His Lordship pointed out that the rule in *Ex parte Waring* (see p. 389, *supra*) only applies where two insolvent

estates are being administered.

(*q*) (1884), 13 Q. B. D. 766.

credit, the date of which was mentioned, and the bills of lading and other shipping documents were in each case attached to the bill. S., in each case, advised the bankers of the drawing of the bill, mentioning the tea against which it was drawn and the name of the vessel by which it was shipped. S. discounted the bills with a Chinese bank, and their agent in London presented the bills for acceptance, and in exchange for the acceptance delivered the bills of lading and other documents attached to the London bankers, in whose name the tea was then warehoused with a dock company. As M. from time to time required portions of the tea for delivery to purchasers, the bankers handed to him warrants or delivery orders, he paying them the value of the tea comprised therein. The moneys thus received were paid to the credit of the general current account of the bankers with their own bankers. In an account in their books with M., they debited him with the amounts of the acceptances and credited him with the amounts received by the sales and with $2\frac{1}{2}$ per cent. according to the agreement. The London bankers suspended payment and filed a liquidation petition before their acceptances matured. It was held that, having regard to the terms of the letter of credit, the bill-holders could not claim any specific appropriation of the teas to meet the acceptances; but that S. was entitled to have the teas which remained in specie at the date of the suspension (but not the proceeds of the sale of the teas which were sold before the suspension) applied in payment of the acceptances (r).

Damages for Dishonour.

Upon dishonour the drawer is entitled to recover not only the amount of the bill and interest, but also all such reasonable expenses as may have been caused by the dishonour, including the expenses of re-exchange.

In *Prehn v. Royal Bank of Liverpool* (s) the defendants, bankers at Liverpool, by their letter of credit to the plaintiffs, grain merchants at Alexandria and Liverpool, undertook to accept the drafts of the plaintiffs' Alexandria firm, the plaintiffs undertaking to put them in funds to meet the bills at maturity, and the

(r) Cf. *Brown, Shipley & Co. v. Kough* (1885), 29 Ch. D. 848.—In this connection reference may be made to pp. 389—

398, *supra*.

(s) (1870), L. R. 5 Ex. 92.

defendants receiving $\frac{1}{2}$ per cent. for the accommodation. Bills were accepted by the defendants under this arrangement, and the plaintiffs duly provided the defendants with funds exceeding the amount of the acceptances. Before the bills became due, the defendants' bank stopped, and they gave notice to the plaintiffs that they would be unable to meet the bills. The plaintiffs arranged with another house in Liverpool to take up the bills, paying $2\frac{1}{2}$ per cent. commission. They were obliged to pay to the holders the expenses of protesting the bills at Liverpool and Alexandria; and had also to incur expense in telegraphic communication between Liverpool and Alexandria. In an action against the defendants for breach of the contract contained in their letter of credit, it was held that the plaintiffs were entitled to recover the commission and the notarial and telegraphic expenses, as damages which were the reasonable and natural consequence of the defendants' breach of contract (*t*).

Stamp Duty.

A letter of credit, if granted in the United Kingdom authorizing drafts to be drawn out of the United Kingdom payable in the United Kingdom, is exempt from duty (*u*). Otherwise it is chargeable like a bill of exchange (*x*).

- (*t*) See also *In re General South American Co.* (1877), 7 Ch. D. 637; *In re Gillespie, Ex parte Roberts* (1886), 18 Q. B. D. 286. Cf. *Walker v. Hamilton* (1860), 1 De G. F. & J. 602; *In re Commercial Bank of South Australia* (1887), 36 Ch. D. 522; and pp. 414—415 and 455—458, *supra*.
- (*u*) Stamp Act, 1891, Schedule, "Bill of Exchange," Exemption (4).
- (*x*) *Ibid.* s. 32. Cf. 16 & 17 Vict. c. 59, Schedule, for definition of term.

CHAPTER V.

CIRCULAR NOTES.

A CIRCULAR note is a request by a bank to its correspondents abroad to pay a specified sum to a named person. The latter is usually furnished with a letter of indication, signed by an officer of the bank and by himself, which is referred to in the circular note, and is intended to be produced on presentation of the note (a).

Questions in connection with these instruments have usually arisen out of their loss by customers.

Loss.

The leading case upon this subject is *Conflans Quarry Co. v. Parker* (b). The facts are sufficiently stated in the judgment of the Court of Common Pleas, delivered by Chief Justice Bovill: "It was an action brought to recover the amount of eight circular notes issued by the defendants to the plaintiffs, and which were lost without being used. The circular notes were procured by an agent of the plaintiffs for their use, and paid for with their money. They were issued and dated the 23rd of May, 1866, signed by the defendants' manager, and addressed to the defendants' correspondents abroad under the general description of 'the bankers mentioned in our letter of indication.' The name of Rembeaux, an agent of the plaintiffs, was filled into the circular notes as that of the person who was to get them cashed. The circular notes were in the usual form, for 10*l.* each, and on the back was the usual blank form of draft to be filled in and signed when the circular note was cashed. The usual letter of indication, stating the names of

(a) Cf. the judgment of Keogh, J., in *Hare v. Copland* (1862), 13 Ir. C. L. 426, at p. 443.
(b) (1867), 3 C. P. 1.

the foreign correspondents, and requesting them to cash the circular notes, was issued with them. Rembeaux's name was filled into the body of the letter, but it was not signed by him. The plaintiffs' agent forwarded the letter of indication and circular notes by post to Paris, addressed to Rembeaux, for the plaintiffs' use abroad. The letter of indication arrived safe; the circular notes did not, and no trace of them has been found. Whether their loss was caused by accident or design, and whether by fault of the post or otherwise, does not appear. On the 12th of July, 1866, the plaintiffs informed the defendants of the loss, offered to return the letter of indication, and demanded a return of the amount paid. A correspondence followed, which ended in a difference as to the proper indemnity to be given, the defendants being then willing to return the amount upon receiving an indemnity of a very extensive character, and the plaintiffs objecting to its terms. This action was thereupon brought. . . . Upon the true construction of the letter of indication and circular notes, we are of opinion that it is not obligatory upon the holder to cash the circular notes, though he purchases a right to do so if he thinks proper; and that, in the event of his not requiring to use them abroad, he may, after reasonable notice of his electing not to use them, require repayment at the banker's hands. This is not inequitable in itself. The banker is repaid by the use of the money, and the holder is in no other condition in this respect than the holder of a simple letter of credit, which has always been understood as giving an option to, not imposing an obligation upon, the bearer to cash his credit to the full amount expressed. In the case of such a letter of credit, he would draw bills upon his banker for the amount advanced, which amount the foreign banker would, or ought to, indorse upon the letter of credit, which the holder would retain until it was exhausted. In this more modern, and, in some respects, more convenient form of effecting the same object, the holder cannot require less than the amount of a circular note, and he is not bound to cash all or any of the circular notes which he has paid for unless he thinks proper. That being so, it follows that the holder has the option of either cashing the notes with any one of the indicated foreign correspondents of the banker, or, if he find no occasion to use them, of reclaiming the amount (whether with any and

what allowance of discount it is unnecessary to consider) of the banker himself. How, then, is this option to be exercised, and under what conditions? The written documents furnish no direct answer; but it is plainly to be read in the character of the transaction itself; and it is that the option to have back the money from the banker cannot be exercised so long as the holder of the circular notes retains the power of procuring cash thereupon from the banker's correspondents; in other words, that the circular notes must in all ordinary cases be returned to the banker, and that he cannot be called upon to return the amount so long as the notes are outstanding, so that he may also be called upon to pay a correspondent who has cashed them. In this respect, it seems impossible that the secondary inferred obligation to return the money if the circular notes be not used can be larger than the primary express obligation that the notes shall be cashed if produced to one of the indicated correspondents. Was there, then, and is there, in this case, a possibility that the bank may be called upon to pay these notes? We think there was and is; and that the existence of such liability is inconsistent with an obligation to return the money. If the circular notes should turn up, and get into Rembeaux's hands, it would be in his power, if (which we are far from suggesting) he were a dishonest man, to procure them to be cashed by any of the indicated correspondents of the bank, who would thereupon have recourse against the bank. The possession of the letter of indication would not preclude such a proceeding. The correspondent who cashes a circular note ought to, and commonly does, for his own protection, look at the letter of indication, for the purpose of identifying the holder of the circular note; but his doing so is not made a condition precedent. If he cashes the circular note for the person mentioned in the letter of indication, he has recourse against the banker, although from civility, over-confidence, or mere omission he may not have asked for the letter of indication. And, on the other hand, if, after the letter of indication has been properly filled in by the rightful owner with his signature, a foreign correspondent cashes a circular note for a thief who has succeeded in stealing the letter of indication and circular note and in forging the name of the holder, no care in looking at the letter of indication can eke out a right to recover against the banker, as upon a

payment to the right person. . . . For these reasons, we think there was no obligation to refund *simpliciter*. It was, however, urged that at all events the bank was liable to refund, *sub modo*; that is to say, upon being indemnified against the outstanding circular notes; and it was said that a proper indemnity had been tendered. The general proposition was hardly contested, but the sufficiency of the indemnity was denied. . . . All we are called upon to decide upon the present occasion is, that, apart from any equitable relief to which the plaintiffs may be entitled upon giving a proper indemnity, they are without recourse against the defendants" (c).

In *Rhodes v. London and County Bank* (d) the plaintiff, while in Rome, had lost six circular notes and the corresponding letter of indication, which were together in his pocket. He communicated the loss to the defendants, and requested them to stop the notes. They were, however, some months after cashed by correspondents of the defendants for persons who produced the letter of indication and forged the plaintiff's name. It appeared that the letter of indication had printed upon it in prominent red type the following: "Particular attention is directed to the following note: For the security of the holder, it is indispensably necessary that this letter should be kept apart from the circular notes, which should on no account be signed except in the presence of the banker from whom payment is required, to whom this letter should also be produced." In an action to recover the amount of the notes Baron Pollock gave judgment for the defendants (e).

(c) Cf. pp. 503, 504, *supra*.

(d) (1880), *Journal of the Institute of Bankers*, Vol. I. p. 770.

(e) See also *Hume Dick v. Herries, Farquhar & Co.* (1888), 4 T. L. R. 541; and authorities cited in note (c) on p. 547, *supra*.

Part VII.

INCIDENTAL SERVICES.

CHAPTER I.

CUSTODY OF THE CUSTOMER'S PROPERTY.

The Banker's Responsibility.

A BANKER is bound to take reasonable care of securities, plate, jewels and other articles of value in small compass which are deposited with him by a customer, and to re-deliver them to his customer upon demand. If the articles are stolen or otherwise lost through the banker's negligence, or if he delivers them to a third person without being authorized to do so by his customer, he will be liable to make good their value.

The care which the banker is bound to take is such care as an ordinarily efficient and prudent banker would take in similar circumstances. Any failure to display this degree of care will constitute negligence, for the consequences of which he will be responsible. But he does not insure the safety of the goods, and if, notwithstanding that he has displayed due care, the articles are lost, he will incur no liability to his customer.

Although this subject has been much debated, it is conceived by the writer that there is no good reason for doubting that the above is an accurate statement of the law. Even if theoretically it is impeachable, it is believed that, in practice, for the reason subsequently given, the result of an appeal to the Courts would be the same as if it were the correct expression of the law.

The view that the responsibility of the banker is less extensive depends upon the assumptions that he is a gratuitous bailee; and, as such, only liable for gross negligence (a).

But, whatever may have been the case a century or less ago, it is now clear that it is the custom of bankers, as such, to receive articles of the kind in question for the purpose of safe custody when proffered by customers (b). When a banker accepts the account of a new customer he expressly or impliedly undertakes to transact for him all business which is usually transacted by bankers of the same category and place, in consideration of the act of the customer in paying moneys to the account and impliedly agreeing to allow the banker any usual commission or other advantages incidental to the keeping of the account.

It is accordingly difficult to see why the banker should be supposed to act gratuitously in discharging one of his functions rather than another.

This view is well expressed in *Beven on Negligence in Law* (c), where, referring to *Giblin v. McMullen* (d), the author says:—

“In the argument of the appeal it was admitted that the appellants were gratuitous bailees; but it does not seem by any means clear that that is necessarily the position of a banker receiving securities for safe custody and without any special agreement. There has grown up a practice of customers sending their jewels and securities to bankers to be taken care of. But the banker discriminates between customers and those who have no existing relation with his bank. If the latter were to wish to place securities with him, he would either refuse or make a charge. The relation of his customer with him makes a difference in this respect, that he acts differently in the customer's case from what he would if the relation of customer did not exist. Then can it fairly be said that the position of a banker taking charge of securities for a customer is identical with that of a man entrusting his

(a) See *Wilkinson v. Coverdale* (1793), 1 Esp. 75; *Beauchamp v. Pawley* (1831), 1 M. & R. 38; *Doorman v. Jenkins* (1834), 2 A. & E. 256.

(b) Cf. the remarks of Lord Campbell in *Brandao v. Barnett*, cited at p. 564, *infra*, and of Hall, V.-C., in *Leese v.*

Martin, cited at p. 568, *infra*. It can hardly be doubtful that, at the present time, a jury would readily find that such a custom exists.

(c) 2nd ed. p. 1563.

(d) See p. 567, *infra*.

gold watch to a friend, or locking up his deed-box in a neighbour's house while he goes out of town? Unless the position is identical, the banker can only be described as a gratuitous bailee in a strained and somewhat unnatural sense."

Similarly, in Smith's Leading Cases, it is said (e):—

"In *Giblin v. McMullen* . . . it was considered that the bank were gratuitous bailees of the securities deposited with them, but this assumption is perhaps open to question, for as, in some cases, a carrier has been held liable as bailee for reward of goods warehoused by him after the transit was complete, the warehousing being accessory to the contract of carriage; see *Cairns v. Robins* (f); so it might be argued that the keeping of securities deposited by his customers is accessory to the general business of a banker, and is held out as an inducement to employ the banker, so as to make him a bailee for reward in respect of them."

A like opinion is expressed in Byles on Bills (g) as follows:—

"A doubt has been raised as to the responsibility of a banker for securities entrusted to him by a customer for safe keeping, on the ground that the banker, being a gratuitous bailee, is only liable for gross negligence. But it is conceived that a banker in such cases can hardly be regarded as acting gratuitously for his customer, such custody being an inducement held out to attract customers, by the use of whose balances the banker is paid. This view seems, moreover, to be in accordance with the most recent case on the subject" (h).

The suggested position of the banker in this relation seems, indeed, to be foreshadowed by Lord Campbell in the course of his judgment in *Brandao v. Barnett* (i), where he says: "Much stress was laid upon the finding that 'it is the custom of bankers, in the course of their trade as such, to receive the interest upon exchequer bills for their customers, and to exchange the exchequer bills when such interest is paid,' but there is no finding that the exchequer bills for which this action is brought and on which the lien is claimed were in the possession of the defendants in the course of their trade as bankers, or that it was their duty as bankers to

(e) 11th ed. Vol. I. p. 193.

(f) (1841), 8 M. & W. 258.

(g) 16th ed. pp. 204-5.

(h) Referring to *Johnston's Claim*, cited at p. 565, *infra*.

(i) (1846), 12 Cl. & F. 787, at pp. 808-9. See Part VIII. Chap. 6.

perform these offices. I think that the transaction is very much like the deposit of plate in locked chests at a banker's. A special verdict might find that it is the custom of bankers, in the course of their trade as such, to receive such deposits from their customers, but I do not think that from that finding a general lien could be claimed on the plate chests. In both cases a charge might be made by the bankers if they were not otherwise remunerated for their trouble."

The case of *In re United Service Company, Johnston's Claim (k)*, goes far in the same direction. There J., the owner of railway shares in two companies, deposited the certificates for safe custody with a banking company, who undertook to receive the dividends for a small commission. On receiving the certificates from the railway companies, J. gave his address in one instance at the office of the bank, and in the other at a club. The manager of the bank, who had the key of the safe where the certificates were kept, fraudulently sold the shares, and forged the name of J. to the transfer. The companies wrote to J., informing him of the transfers, and receiving, in one instance, no answer, and in another an answer in J.'s name forged by the manager, registered the transfer. J. afterwards, on discovery of the fraud, brought suits against the two companies and the transferees of the shares, in which he recovered the shares, but the Court gave him no costs. The banking company being wound up, J. claimed to prove against the company for the amount of his costs in the suits which had been occasioned by their negligence. It was held that the banking company were bailees for reward of the certificates, and that they had been guilty of culpable negligence in keeping them; but that the loss of the costs was too remote a consequence of the negligence of the company for them to be held liable for it, and the claim was accordingly rejected.

"The company," said Lord Justice James, "were his bankers; he had deposited with them the certificates in question, together with other documents of like character, some with coupons and some without. The bank, in consideration of a very small commission, undertook his banking account, and were authorized to

receive the dividends on those shares, and to collect the coupons as and when they became due. It further appeared that the bank had passed a resolution for the safe custody of their customers' securities, by a provision that they should be deposited with the Bank of England, a resolution which was utterly impracticable and impossible, having regard to the nature of banking business. The resolution having failed, as it necessarily must have failed, no further provision whatever was made by the bank or the directors for the safe custody of the securities of their customers or of their own. In truth, it appears that without any control, without any care, without any supervision whatever, they fell into the power of the manager, who used these shares, as he seems to have used other securities belonging to the bank, for his own purpose, and forged the transfer, which was the subject of the litigation before me. Under these circumstances, the Master of the Rolls was of opinion that the bankers were bailees for reward, and that there was sufficient negligence in the performance of their duty as such bailees to render them liable for the consequences of that negligence. In both these conclusions we concur. We are of opinion that this case, on the first point, is entirely distinguishable from the case of *Giblin v. McMullen* (*l*), where a box containing documents was placed at a bank simply for the purpose of convenient deposit, and the customer alone had access to it for the purpose of placing or removing anything he pleased. In this case, although it is true that the possession of these particular documents was not essential to the collection of the moneys which the bank were authorized to collect, it appears to us that they came into their custody in the ordinary course of their business as bankers (*m*), that they were deposited with the bank by a customer of the bank, and that such deposit was made under such circumstances as would have entitled the bank to a lien upon them for their general banking account. These considerations appear sufficient to dispose of the first point. We are further of opinion that the negligence of the bank is proved; that leaving the securities of the customers in the way in which they were left, in the uncontrolled and unwatched power of the manager, Mr. Hudson, was a gross neglect,

(*l*) See p. 567, *infra*.

(*m*) Cf. *In re De Pothonier, Dent v. De Pothonier*, cited at p. 574, *infra*.

and is not excusable or justifiable by reason of the fact that they were equally negligent with regard to their own documents and their own securities."

Giblin v. McMullen (n), which is referred to in the judgment just quoted, is commonly relied upon as an authority for the view opposed to that which is here put forward. There an action for damages was brought in Victoria against a bank, as bailees, for the negligent keeping of certain railway debentures placed in their care by a customer. It appeared that soon after opening his account the customer deposited a box containing the securities. No special arrangement was made at that time or subsequently with regard to its custody, nor did the bank receive any special benefit for keeping it. The customer kept the key, while the box itself was kept in a strong-room in the bank with the boxes of other customers, and specie and other securities belonging to the bank. Access to this room was only obtained by passing through a compartment where a cashier sat by day, and a messenger slept at night. The strong-room had two iron doors, which were opened by separate keys, which during the day were kept by the cashier who occupied the compartment. One of the keys was kept at night by the cashier of the bank, and the other key by another officer of the bank. Beyond this strong-room there were two other rooms: in the outer of the two uncoined gold, and in the inner bullion and unsigned notes were kept. The manager of the bank kept the key of the outer of these rooms, and one of the directors of the bank that of the inner. The owner of the box had free access to the room where his box was deposited during banking hours in the presence of one of the bank clerks when he had occasion to take out coupons from his debentures for collection. While in such custody the cashier abstracted the debentures from the box and made away with them. It was held that there was no evidence to go to the jury in support of the plaintiff's case.

Lord Chelmsford, delivering the judgment of the Judicial Committee, said: "It is clear, according to the authorities, that the bank in this case were not bound to more than ordinary care of the deposit entrusted to them, and that the negligence for which

(n) (1869), L. R. 2 P. C. 317; 38 L. J. P. C. 25; 21 L. T. 214; 17 W. R. 445.

alone they could be made liable would have been the want of that ordinary diligence which men of common prudence generally exercise about their own affairs. . . . It may be admitted not to be sufficient to exempt a gratuitous bailee from liability that he keeps goods deposited with him in the same manner as he keeps his own, though this degree of care will ordinarily repel the presumption of gross negligence. But there is no case which puts the duty of a bailee of this kind higher than this, that he is bound to take the same care of the property entrusted to him as a reasonably prudent and careful man may fairly be expected to take of his own property of the like description. . . . No one can fairly say that the means employed for the protection of the property of the bank and of the plaintiff were not such as any reasonable man might properly have considered amply sufficient."

As to this case, the following observations may be made:—

1. Being a decision of the Privy Council, it would not necessarily be followed by the Courts having jurisdiction in this country (*n*).
2. The plaintiff, upon the appeal, admitted that the bank were only gratuitous bailees, and fought the case upon the ground that they had been guilty of such negligence as to render them liable in that character.
3. The Judicial Committee held, as a matter of law, that the bank would have been liable only if they had failed to show that ordinary diligence which a reasonably prudent and careful man might fairly be expected to take of his own property of the like description.
4. The judgment really turned upon their view that the facts of the case did not show a want of such diligence.

One other case must be referred to, in which, although the decision did not turn upon the point, the question now under discussion was considered.

In *Leese v. Martin* (*o*) Vice-Chancellor Hall said (*p*): "The evidence . . . to which I have already referred, that the boxes in question were only deposited for safe custody, is clear; and that the bankers, there being no special duty undertaken by them or contract entered into with them in reference thereto, or their contents, were merely gratuitous bailees, seems to me to be also

(*n*) See *Dulieu v. White & Sons*, [1901] 2 K. B. 669, at p. 677. VIII. Chap. 6.

(*o*) (1873), 17 Eq. 224, cited in Part (*p*) At p. 234.

clear, according to the decision in *Giblin v. McMullen* (*q*), there not being here, as in *In re United Service Company, Johnston's Claim* (*r*), any arrangement for the bankers receiving dividends or income payable on any of the securities contained in the boxes. The bankers being merely gratuitous bailees, and William Leese being allowed to open the boxes from time to time, and to come and take them away, how can the defendants maintain their alleged lien? They had nothing to do with the contents of the boxes in the way of receiving either principal or income. They were wholly ignorant as to what the boxes contained. The lien, if any, could not extend to such of the documents as belonged to William Leese's customers. The defendants never have asserted such a lien in any other case, and they are not able to mention any case in which such a lien has been asserted by any other person. Mr. Lightbody's evidence negatives the assertion of any such lien in any other case. The defendants, relying as they do on the general law that a bailee has a lien on the securities of his customer coming into his possession in the course of his business as banker, say that the boxes did come into their possession as bankers, in the course of their business as bankers, because they and other—not all other—bankers in London do allow their customers to deposit boxes in their strong-rooms. But this statement falls short of alleging a general custom applicable to all bankers, or even to all bankers in London, and I therefore apprehend that the defendants must now allege, and clearly prove, a special custom. That, however, they have not done; and for this I refer to *Bellamy v. Marjoribanks*” (*s*).

Accordingly, it appears that it has never been decided in an English Court, against a contention to the contrary, that the banker is a gratuitous bailee in the circumstances under consideration; while, if the matter were now litigated, it seems clear that a general custom of receiving the boxes of customers would be proved, which would exclude such a decision for the reasons indicated above (*t*).

(*q*) See p. 567, *supra*.

(*r*) See p. 565, *supra*.

(*s*) (1852), 7 Ex. 389.

(*t*) The case of *Langtry v. Union Bank*

of London (1896), “Times,” 6th May, p. 16, having been compromised, cannot, of course, be treated as any authority upon the subject.

But it remains to be pointed out that, even supposing the contrary were held, the practical effect upon the banker's position would probably be little. For he would still be clearly liable for the consequences of gross negligence, or the neglect of the ordinary care which he displays, or rather which bankers generally display, in the conduct of their business.

"If a man gratuitously undertakes to do a thing to the best of his skill, where his situation or profession is such as to imply skill, an omission of that skill is imputable to him as gross negligence" (u).

Accordingly, in *Wilson v. Brett* (x), where a person rode a horse gratuitously at the owner's request, for the purpose of showing him for sale, and the horse slipped and broke one of his knees, it was held that the rider was bound to use such skill as he actually possessed. The jury having found for the plaintiff a rule for a new trial was refused.

"The defendant," said Parke, B., "was shown to be a person conversant with horses, and was therefore bound to use such care and skill as a person conversant with horses might reasonably be expected to use; if he did not, he was guilty of negligence. The whole effect of what was said by the learned judge as to the distinction between this case and that of a borrower was this: that this particular defendant, being in fact a person of competent skill, was in effect in the same situation as that of a borrower, who in point of law represents to the lender that he is a person of competent skill. In the case of a gratuitous bailee, where his profession or situation is such as to imply the possession of competent skill, he is equally liable for the neglect to use it" (y).

Now a banker whose conduct is challenged must be judged as such. All callings demand characteristic qualities upon the part of those pursuing them. The qualities of care and caution of a high degree in the custody of valuable articles in small compass are as inseparable from the conception of an ordinary banker as are the like qualities in the manipulation of poisons from the con-

(u) Per Lord Loughborough in *Shiells v. Blackburne* (1789), 1 H. Bl. 158, at p. 162.

(x) (1843), 11 M. & W. 113; 12 L. J. Ex. 264.

(y) See also *Wylde v. Pickford* (1841), 8 M. & W. 443 (explained in *Butt v. Great Western Rail. Co.* (1851), 11 C. B. 140); *Harmer v. Cornelius* (1858), 5 C. B. N. S. 236, at p. 246.

ception of an ordinary chemist, or special pushfulness from that of a commercial traveller. A banker habitually omitting to take such precautions for the safe custody of valuable articles as are approved by his community would be neither an ordinary banker nor an ordinary business man. Negligence which, in the case of another person, might be unrecognisable, would be appalling in the case of a guardian of credit and capital. *Spondes peritiam artis*: the banker publicly professes the art of taking care, which may, indeed, be considered the historical origin of his other functions. That he should act accordingly in all matters entrusted to him by his customer is expected as a matter of course.

Consequently, that in a banker would be gross negligence which would not be so in others. And if the law were laid down to a jury in the terms used by Lord Chelmsford in *Giblin v. McMullen*, it can hardly be doubted that they would hold him liable if he failed to show that he had taken all precautions which experience had shown to be usual and proper.

As to the facts in that case, it is to be observed that the cashier had been permitted to keep both keys. In view of this, if facts similar to those proved in that case were now to come before a Court in this country, it can hardly be doubted that the judge would hold that the evidence must go to the jury, and it is conceived that it is not improbable that they would thereupon find for the plaintiff.

Delivery to Unauthorized Person.—In the case of a delivery by the banker of the articles entrusted to him by his customer to some third person, the banker's liability may be rested upon a different ground. In the absence of authority from his customer, his act would amount to a conversion (z).

The Legal Possession.

"It seems to us," said Mellish, L. J., delivering the judgment of the Court of Appeal in *Ancona v. Rogers* (a), "that goods which

(z) See *Jones v. Dowle* (1841), 9 M. & W. 19; and cf. pp. 481—487, *supra*.

(a) (1876), 1 Ex. D. 285, at p. 292; 46 L. J. Ex. 121; 35 L. T. 115; 24 W. R. 1000.

have been delivered to a bailee to keep for the bailor, such as a gentleman's plate delivered to his banker, or his furniture warehoused at the pantechuicon, would, in a popular sense, as well as in a legal sense, be said to be still in his possession, and we see no valid ground for holding that they are not still in his possession within the meaning of the Bills of Sale Act. As long as the person who has parted with goods by a secret bill of sale is having the goods kept for him and is exercising dominion over them, the case seems within the mischief against which the Act is directed."

CHAPTER II.

DEPOSITS BY TRUSTEES.

THE principles governing the employment of bankers by trustees have been considered in Part II. Chap. 3.

It will be convenient to point out in this place that the Courts have recognised a bank as an eminently proper place for the deposit of trust property in the names of the trustees jointly. In such cases the banker will be bound to see that he has the authority of all the trustees before he parts with or disposes in any way of what is deposited with him.

In *Mendes v. Guedalla* (a) it was held that securities payable to bearer, and of which the interest is payable half-yearly upon coupons, may without breach of trust be deposited by trustees in a box at a banker's on account of all the trustees, one being allowed by the rest to keep the key of the box in order to obtain the coupons. It was further held that if two of three trustees commit the box to the third, a stockbroker, for the purpose of conversion, they are bound to ascertain, when the box is returned to the bankers, that such conversion has been effected, and the new securities restored to the joint custody of all the trustees; and that if the two rest satisfied with the assurance of the solicitor for the trust that he saw the box returned to the bankers, without more, they will be liable to make good any of the new securities which the third trustee may have appropriated to his own use.

In the course of his judgment, Page Wood, V.-C., said: "I do not see what better course the trustees could have adopted for the protection of the property. They deposited it in a box with

(a) (1862), 2 J. & H. 259.

the bankers, in trust for all the three trustees. It was property payable to bearer, and which passed by delivery; and with regard to property of that description (whether it be a plate chest, or whatever it may be), I know of no better course to take for protecting it than to deposit it at your bankers'. It must be deposited somewhere. It cannot be in three houses at once. The only other course which suggested itself to me was to deposit it in a box with three locks, opened by three different keys, one to be kept by each of the three trustees, so that the box could not be opened without the permission of all the trustees. But where the interest of property is payable upon coupons, and twice a year, and the box must be opened twice a year for the purpose of obtaining access to the coupons, it is too much to say that a man of ordinary prudence in the management of his affairs would think it necessary, for the protection of the property, to adopt a course of that kind—knowing, as he would, that it would be the bankers' duty to see that the coupons only were taken out of the box on each occasion, and that neither the box itself nor the securities were removed. Here the box stood at the bankers' upon trust for all the three trustees. They held it expressly upon the terms of the letter of February, 1850 (*b*), requesting them to hold it upon trust for all the three trustees. They ought not to have parted with it, or allowed more than the coupons to be taken out, without the authority of all the three trustees. Upon the former occasion, when the bonds were required for the purpose of conversion, they objected, very properly, to part with the box to one of the trustees without a written authority from the other two, although eventually they were satisfied with an authority signed only by one; but afterwards, unfortunately, they neglected even that precaution."

So in the recent case of *In re De Pothonier, Dent v. De Potho-*

(*b*) Mrs. Jesse Brandon, who had been sole trustee, upon the appointment of two other trustees, wrote a letter, dated February, 1850, to the bankers as follows: "*Re* John J. Brandon, deceased. Messrs. Samuel Helbert Ellis and Haim Guedalla have been appointed trustees of this estate jointly

with myself. I beg to request that you will transfer to the following account, namely, Mrs. Jesse Brandon and Messrs. Samuel Helbert Ellis and Haim Guedalla, the cash balance standing to the credit of this estate, and also the box containing various securities now held by you and belonging to the estate."

nier (c), it was held that, where trustees are expressly authorized to retain or invest in convertible securities, such as bonds transferable by delivery with coupons attached, they may deal with them in the way usual with prudent men of business, and may deposit them in their joint names with the bankers to the trust upon a simple acknowledgment by the bankers of the receipt thereof.

"As I understand," said Cozens-Hardy, J., "the trustees have a current trust account with their bank. The bankers are well-known bankers. It is the ordinary usage of bankers, with whom bonds of this nature are deposited, to discharge the duty of cutting off the coupons when due, collecting them, and placing the amount to the credit of the customer's amount. I think the trustees would be perfectly justified in depositing the bonds with the bankers upon those terms, which will not justify the bankers in parting with the bonds except under the authority of all the trustees, but will justify the bankers in cutting off the coupons and collecting them as and when they are due, in the ordinary course." His Lordship then referred to the case of *Field v. Field* (d), and proceeded: "It is no part of a solicitor's duty to cut off these coupons and collect them, while it is part of the duty of the banker. My judgment is that it is part of the duty which he undertakes for his customer. The order should, I think, be in this form: The plaintiffs and the defendant Mrs. De Pothonier may be authorized to deliver the bonds and debentures to the Union Bank of London, Limited, to be deposited in their joint names, for safe custody and for the collection of coupons so long as the bank acts as the bankers of the trustees."

But in the absence of special circumstances, a trustee is not entitled to have title-deeds and non-negotiable securities removed from the custody of a co-trustee and placed at a bank, in a box accessible only to the trustees jointly.

In *In re Sisson's Settlement*, *Jones v. Trappes* (e), one of the trustees of a settlement applied for an order directing his co-trustee to concur with him in placing the deeds and documents of title and securities relating to the trust in a box, accessible only to the trustees jointly, the box to be deposited at a bank approved by

(c) [1900] 2 Ch. 529.

(d) [1894] 1 Ch. 425.

(e) [1903] 1 Ch. 262.

the Court. The documents, which consisted of certificates of railway and other stock standing in the joint names of the trustees, and the title-deeds of a freehold house at St. Asaph, had been for many years in the possession of the respondent, who had kept them in a box in a safe at his solicitor's, retaining the key of the box himself. He had recently removed them to his own house, being advised that this was the proper course. There were no bearer securities. The position, responsibility, and integrity of the respondent were unimpeachable, and it was not suggested that the documents were in any jeopardy. The applicant had always been given every facility for inspecting the documents at the solicitor's without charge. The applicant, however, claimed as a matter of strict right to have the documents placed in the joint custody of the trustees, as asked by the summons.

Swinfen Eady, J., in delivering judgment, said: "The applicant says there is a strict rule entitling him as a matter of legal or equitable right to have the documents kept in a box, which shall not remain in the physical possession of either trustee, but be placed at a bank in their joint names. I am of opinion that the applicant has no such legal or equitable right, and that no rule hitherto established requires trust documents, consisting of title-deeds and certificates of registered stock, to be put in such a position that no trustee can even look at them without the presence or concurrence of his co-trustees, as would be the case if they were placed at a bank in a box to which each trustee had a different lock and key. Such a rule would greatly impede the execution of trusts. The applicant's case and the respondent's opposition are based simply on their strict legal or equitable rights. The applicant has made no case whatever for removing the documents from their present custody, where they have remained for many years in perfect safety, and where, so far as I can see, they are perfectly safe."

CHAPTER III.

SERVICES GENERALLY.

It is not necessary to attempt an enumeration of the almost unlimited varieties of services in financial, and even in other, matters which are commonly rendered by bankers to their customers.

In most of these transactions the banker is an agent. Thus he acts in this character when he makes payments on behalf of his customer, whether occasional or periodical, such as insurance premiums, allowances, club subscriptions, and the like; when, upon a conversion or renewal of bonds, he procures the necessary exchanges or renewal; when he delivers or receives securities on receipt or payment of a specified consideration; when he acts as the attorney of his customer under a formal power; when he procures for him a form of power of attorney, a passport, or a licence; and when, at the request of his customer, he obtains information as to the financial position or character of a person with whom he is contemplating business relations.

Sometimes he is employed by a Government, a local authority, or a company, as its agent in a financial operation, such as the issue of a loan, or the payment of coupons or bonds.

Sometimes, indeed, he is employed in a permanent capacity by a corporation or a company as its treasurer or registrar. The State itself is thus served by the Bank of England in the matter of the National Debt.

In other cases the banker becomes an independent contracting party: for example, where, at the request of his customer, he gives an indemnity or guarantee, or accepts a bill of exchange, or marks a cheque, or indorses a bill of exchange, in order that his customer

may be able to sell it, and so make a profit by the rate of exchange (a).

In yet other cases he becomes a trustee: as when he accepts a transfer of stock into his own name for the convenience of a customer who has purchased it.

It would obviously be outside the scope of this work to follow the activity of the banker along these various lines, which traverse a vast area of the interests of mankind, and are followed by people of widely different avocations. Those functions which are peculiar to bankers, and the branches of business in which they take a well-defined and special part, naturally call for detailed treatment in this work. For the rest, which are the subject of this chapter, it must suffice to indicate the general principles which are applicable.

Duty to Customer.

“The agent is bound, like every person who enters into a contract of employment, to account for such property of his employer as comes into his hands in the course of the employment; to use ordinary diligence in the discharge of his duties; to display any special skill or capacity which he may profess for the work in hand. . . . The agent must make no profit out of transactions into which he may enter on behalf of his principal in the course of the employment beyond the commission agreed upon between them (b). Where an agent is promised a reward or payment which might induce him to act disloyally to his employer, or might diminish his interest in the affairs of his employer, he cannot recover the money promised to him; or if he obtains money by a transaction of this nature, he is bound to account for it to his principal, or pay it over to him. . . . The agent may not depart from his character as agent and become a principal party to the transaction, even though this change of attitude do not result in injury to his employer. If a man is employed to buy or sell on behalf of another he may not sell to his employer or buy of him. Nor if he is employed to bring his principal into contractual relations with others may he assume the position of the other contracting party” (c).

“It is the duty of every agent to strictly pursue the terms of his

(a) See *Société Générale v. Metropolitan Bank* (1873), 27 L. T. 849.

(b) See pp. 48, 63, *supra*.

(c) Anson's Law of Contract, 10th ed. pp. 356—358.

authority and obey the lawful instructions of his principal, and, in the absence of express instructions, to act according to any lawful and reasonable usage applicable to the matter in hand, or, where there is no special usage, and in all matters left to his discretion, to act in good faith to the best of his judgment, solely for the benefit of his principal" (d).

Within the scope of his business, the banker is bound to exercise the degree of skill, care, and diligence, usual in the ordinary conduct of banking business, and reasonably necessary for the proper performance of the duties undertaken by him (e).

Where a banker acts gratuitously he is bound to exercise on behalf of his customers such skill as he possesses, and such care and diligence as he is in the habit of exercising in regard to his own affairs; but he is not liable for mere want of skill, except in so far as he holds himself out as possessing it, or as a person in his situation may reasonably be expected to possess it (f).

It is conceived that the onus would lie upon the banker, in any ordinary case, of showing that his services were gratuitous, and that he could only do so by showing that they were not undertaken by him in his capacity of a banker. The cases in which it will be difficult for him to establish this must tend to increase in number as the area of his customary functions grows wider and more generally recognized. And even if he succeeds in discharging this onus, it is submitted, for the reasons given elsewhere (g), that the measure of his obligation to display skill, care, and diligence, will often be practically the same as in cases where he is admitted or held to act for reward.

Interpretation of Instructions.

The scope and meaning of the instructions given to a banker must be gathered from all the circumstances of the case, including the customary course of business.

(d) Bowstead's Law of Agency, 2nd ed. pp. 109, 110.

(e) *Beal v. South Devon Rail. Co.* (1864), 3 H. & C. 337; *Solomon v. Barker* (1862), 2 F. & F. 726; *Harmer v. Cornelius* (1858), 5 C. B. N. S. 236; *Reeve v. Palmer* (1859), 5 C. B. N. S. 84; *Lee v. Walker* (1872), L. R. 7 C. P. 121; *Brighton Empire and Eden Syndicate v. London and*

County Banking Co. (1904), "Times," 24th March, p. 13. See also pp. 562—571, *supra*.

(f) *Moffatt v. Bateman* (1869), L. R. 3 P. C. 115; *Wilson v. Brett* (1843), 11 M. & W. 113; *Dartnall v. Howard* (1825), 4 B. & C. 345; *Whitehead v. Greetham* (1825), 2 Bing. 464.

(g) See pp. 570, 571, *supra*.

“When an express authority is given there is an implied authority combined with it to do all acts which may be necessary for the purpose of effecting the object for which the express authority is given” (*h*).

“If a principal gives an order to an agent in such uncertain terms as to be susceptible of two different meanings, and the agent *bonâ fide* adopts one of them, and acts upon it, it is not competent to the principal to repudiate the act as unauthorized because he meant the order to be read in the other sense of which it is equally capable. It is a fair answer to such an attempt to disown the agent’s authority, to tell the principal that the departure from his intention was occasioned by his own fault, and that he should have given his order in clear and unambiguous terms” (*i*).

“Authority conferred in general terms is construed as authority to act only in the usual way, and according to the ordinary course of business. In particular, an agent who is authorized to receive payment of money has, *primâ facie*, no authority to receive payment otherwise than in cash, unless it is usual or customary in the particular business to receive payment in some other form, and the usage or custom in question either is a reasonable one, or is known to the principal at the time when he confers the authority” (*k*).

Many illustrations of these general principles have already been given, particularly in dealing with the collection of drafts in Part V. It will be convenient to add in this place illustrations of the banker’s duty in special reference to the incidental services which are the subject of this chapter.

Negotiation of Documentary Drafts.—In *Borthwick v. Bank of New Zealand* (*l*) the plaintiff carried on business in London as an importer of frozen meat. The defendant bank, at the plaintiff’s request, undertook to negotiate, at the bank’s option, drafts drawn by the shippers on the plaintiff in respect of consignments of frozen meat, the drafts to be accompanied by shipping documents, *i.e.*, bills

(*h*) Per Romilly, M. R., in *Pole v. Leask* (1860), 28 Beav. 562, at p. 574; on app., 33 L. J. Ch. 155.

(*i*) Per Lord Chelmsford in *Ireland v. Livingston* (1872), 5 E. & I. A. 395, at

p. 416; 36 L. J. Q. B. 50.

(*k*) Bowstead’s *Law of Agency*, 2nd ed. p. 64.

(*l*) (1900), 6 Com. Cas. 1.

of lading, invoice, and policy of insurance. The bank negotiated a draft attached to which was a policy containing a clause: "To pay a total loss by total loss of vessel only." The usual form of policy in the frozen meat trade is a policy covering all risks. The plaintiff in the usual course of business accepted the draft before he had examined the documents. A partial loss of the consignment took place which by reason of the clause in the policy the plaintiff could not recover from the underwriters. It was held that the bank had committed a breach of its contract with the plaintiff in negotiating a draft which was not accompanied by a policy of insurance in the proper form, and that the bank was liable to make good the loss to the plaintiff.

In the course of his judgment Mr. Justice Mathew said: "Under that contract," *i.e.*, the contract contained in the letter of credit given by the plaintiff to the bank, "when a shipment was made and a draft was brought to the defendants for them to negotiate, their first consideration ought to be whether the draft was such as the plaintiff would accept, and, therefore, the representative of the bank should examine the documents attached to the draft in order to see whether they were those stipulated for in the letter of credit. If that precaution were taken, the documents should consist of proper bills of lading and invoices and a policy of insurance, and the object of the stipulations in the letter of credit being to protect the plaintiff, the policy should be an all-risks policy, which, on the evidence, I am satisfied is the ordinary policy in business of this kind. . . . The letter of credit says in express terms that the defendants are not to be responsible in the event of any misrepresentation as to quantity, quality, or value of the consignment. That is; I think, a clear indication of an intention that some responsibility should be cast upon the defendants, and their responsibility would seem to extend to everything that was not expressly excepted. The documents and drafts relating to the consignment in question came forward in the ordinary course. The drafts were sent to the plaintiff for his acceptance, while the documents, as was usual, were retained by the defendants. The plaintiff could not conjecture that one of the policies was in an unusual form, and he accepted the drafts in the ordinary course of business. Neither the defendants nor anyone else examined the documents until after a

serious particular average loss had occurred to the goods, and it was then discovered that the loss was not covered by the insurance" (*m*).

Sale and Purchase of Stocks and Shares.—A banker instructed by a customer to buy or sell shares, stock, or other marketable securities, is bound to act in the matter with all proper promptitude and care, both in placing the order, and procuring and forwarding to, or holding for, his customer the proper documents of title, or obtaining and crediting to him the proceeds as the case may be.

If he negligently forwards to the broker instructions varying from those which he has himself received, he will be liable on the one hand to his customer, if he has in consequence suffered damage by losing the bargain authorized; and, on the other hand, to the broker, if the customer repudiates the transaction and the broker thereby sustains loss (*n*).

If he pays the price of stock purchased without receiving a properly executed transfer and the certificate, and the customer does not obtain the stock, he will be unable to debit his customer with the amount so paid (*n*).

If he, when instructed to sell, hands over the transfer and certificate in exchange for the broker's cheque and the latter is dishonoured, he will probably be liable to his customer for the loss sustained in consequence (*o*).

Moreover, the broker must pay the price in such a way as to facilitate the transmission of the money to the customer: he cannot discharge himself by paying the banker by a settlement of account in which the broker gets the benefit of the payment (*p*).

In practice, these difficulties as to payment are obviated by the

(*m*) Cf. *Basse and Selve v. Bank of Australasia* (1904), 20 T. L. R. 431, where it was held that the duties of a banker instructed to negotiate drafts of a particular person against bill of lading, policy of assurance, and chemist's certificate of analysis, are limited to seeing that he deals with the person indicated, and that the documents presented by him purport on their face to be those specified. See also pp. 417, 473, *supra*.

(*n*) See Bowstead's Digest of the Law

of Agency, 2nd ed. pp. 156—166, and authorities there cited.

(*o*) See *Papè v. Westacott*, [1894] 1 Q. B. 272; especially the observations of Davey, L. J., at p. 283; 63 L. J. Q. B. 222; 70 L. T. 18; 10 T. L. R. 51; 42 W. R. 131.

(*p*) *Pearson v. Scott* (1878), 9 Ch. D. 198, at p. 208; *Crossley v. Magniac*, [1893] 1 Ch. 594. Cf. *Hawkins v. Pearse* (1903), 9 Com. Cas. 87.

fact of the broker, as well as the customer who gives the instructions, keeping an account with the banker, which is debited or credited as the case may be.

The position of the banker in relation to the broker where he discloses the name of his customer may be open to some doubt. On general principles it would seem that, in such a case, he merely establishes privity of contract between the customer and the broker, who become reciprocally bound to one another, and himself incurs no liability upon the contract (*q*). It may however be that, from the nature of the circumstances, it would be held that, in the absence of express provision to the contrary, credit is given by the broker to the banker and that this is intended by the banker (the name of the customer being given merely to identify the transaction or supply the information necessary for the preparation of the transfer), and, accordingly, that the broker is entitled to treat the banker as directly liable to him (*r*).

Owing to the knowledge which the banker has of the state of the account of the customer upon whose instructions he acts, and his power to protect himself against the suggested liability, if it exists, it may be long before the legal position in this matter is authoritatively defined.

The practice of bankers, in this connection, of acting only upon particular instructions, as distinguished from the making of investments at their own discretion, was pointed out by Vice-Chancellor Kindersley in a case decided fifty years ago (*s*). "It is," said his Honour, "notorious that their practice is, not to act for their customers as money scriveners or agents generally, to find investments for their money, but if a customer sends them, with a power of attorney, a letter of instructions, directing them to sell a particular sum of stock, they will do so; or if the customer wishes a particular investment in the funds, and directs them to lay out his

(*q*) *De Bussche v. Alt* (1877), 8 Ch. D. 286; 47 L. J. Ch. 381; 38 L. T. 370; *Pearson v. Scott* (1878), 9 Ch. D. 198; *Crossley v. Magniac*, [1893] 1 Ch. 594. Cf. *Anderson & Co. v. Beard*, [1900] 2 Q. B. 260.

(*r*) See *Calder v. Dobell* (1871), 6 C. P. 486; *Harris v. Truman* (1882), 9 Q. B.

D. 264, at p. 271. On the other hand, the mere non-disclosure by a broker of the jobber's name does not render the broker liable on the contract: *Gill v. Shepherd & Co.* (1902), 19 T. L. R. 17.

(*s*) *Bishop v. Countess of Jersey* (1854), 2 Drew. 143, at p. 162; 23 L. J. Ch. 483.

money in the purchase of particular stock, and debit him with the amount, they will do so; and when they do, be it observed, they do so ordinarily without a cheque, but on a particular letter of instructions. . . . It is not within the scope of the business of bankers to seek or make investments generally for their customers."

Confidential Information.—A banker giving, in confidence to one who makes inquiry of him as to the financial character or position of another, information in good faith and with reasonable care as to its accuracy, incurs no liability to anyone.

I. As regards the Person in Question.—"If a person who is thinking of dealing with another in any matter of business asks a question about his character from someone who has means of knowledge, it is for the interests of society that the question should be answered, and if answered *bonâ fide* and without malice, the answer is a privileged communication" (*t*).

In *Robshaw v. Smith* (*u*) the plaintiff was a London merchant who had had business relations with the London and Yorkshire Bank, of which the defendant was general manager. The latter, on being applied to by one Hudson for information about the plaintiff, handed to him an anonymous letter about the plaintiff which he had received a year previously, and which contained defamatory charges against the plaintiff. It was held that this communication by the defendant was privileged (*x*).

II. As regards the Party Informed.—If intentionally misleading information is given in writing and signed, and the party to or for whom it is given sustains loss in consequence, the signatory party may be held liable in damages.

The qualification that the representation must be in writing and signed, in order to create liability, was introduced by sect. 6 of Lord Tenterden's Act (*y*).

This subject is discussed at length in Part VIII. Chap. 4, and has also been incidentally noticed at pages 61 and 62.

(*t*) Per Brett, L. J., in *Waller v. Loch* (1881), 7 Q. B. D. 619, at p. 622; 61 L. J. Q. B. 274.

(*u*) (1878), 38 L. T. 423.

(*x*) See also *Waller v. Loch*, cited in

note (*t*), *supra*; *Hopwood v. Thorn* (1849), 8 C. B. 293; 19 L. J. C. P. 94; 14 Jur. 87.

(*y*) 9 Geo. 4, c. 14.

A banking company, as distinguished from a banking firm, cannot be held liable upon such a representation, because a company cannot itself sign a document (*z*), being in the nature of things incapable of acting except through agents.

But an official who signs a letter or other document giving the information may be held personally liable (*a*).

Whether such words as, "Confidential. For your private use and without any guarantee or responsibility on the part of this bank or the manager," contained in the document, will in any way protect the manager, is doubtful (*b*). To the present writer it appears that they will not.

If the information is given to another bank with the intention that it shall be communicated to a customer, he will be entitled to hold the party giving it responsible (*c*).

(*z*) *Hirst v. West Riding Union Banking Co.*, [1901] 2 K. B. 560; 70 L. J. K. B. 828; 85 L. T. 3; 17 T. L. R. 629; Bankers' Magazine, Vol. 72, p. 259.

(*a*) *Swift v. Jewsbury*, cited at p. 61, *supra*. See also the case cited in the last note as reported in the Times Law

Reports and the Bankers' Magazine.

(*b*) See the case cited in note (*z*), *supra*, as reported in the Times Law Reports and the Bankers' Magazine.

(*c*) *Ibid.* See also *Hosegood v. Bull* (1876), 36 L. T. 617.

Part VIII.

ADVANCES.

CHAPTER I.

COMMON FORMS OF LOAN.

WHEN a banker by lending money to his customer becomes his creditor, the normal relation of banker and customer is inverted.

A person *bonâ fide* carrying on the business of banking, although he habitually lends money, does not come within the provisions of the Money-lenders Act, 1900 (*a*).

Where a banker makes an actual advance to his customer in cash or its practical equivalent, or allows him to overdraw his account, he lends money in the ordinary and true sense of the words.

Where he credits his customer's account with a particular sum, or agrees to allow him an overdraft, this in itself is not a true loan, but an undertaking on his part to honour his customer's drafts up to the specified amount, exclusive of any cash or drafts subsequently paid in by the customer.

When the banker discounts bills, preserving a right of recourse against the person whom he pays, although in law he purchases the bills, the practical effect of the transaction is similar to that of a loan of money upon the security of the bills (*b*).

An overdraft is a loan in the ordinary legal meaning of the term.

Thus, a loan at interest to a building society from its bankers, secured by deposit of title-deeds, and made by allowing the society to overdraw its account at the bank, is a "loan" within the meaning of sect. 15 of the Building Societies Act, 1874 (*c*).

(*a*) 63 & 64 Vict. c. 51, s. 6 (*d*).

(*b*) See pp. 595—598, *infra*.

(*c*) *Brooks & Co. v. Blackburn and District Benefit Building Society* (1884),

But allowing overdrafts from time to time from a specified date is not necessarily the same thing as advancing a sum equal to their amount upon that date, as against a third party agreeing to guarantee or giving a mortgage to secure repayment of such an advance.

In *Burton v. Gray* (d) the plaintiff had handed title-deeds to his brother to enable the brother to borrow 600*l.* from H. The brother deposited them at his bankers with a memorandum of deposit addressed to them, and purporting to be executed by the plaintiff, to the following effect:—"In consideration of your banking company lending to Mr. Frederick Burton, of," &c. (the brother), "the sum of 1,000*l.* sterling for seven days from this date, and of 5*s.* sterling now paid by you to me, the receipt of which I hereby acknowledge, I deposit with you," &c. The bankers did not place 1,000*l.* to the credit of the brother, but during the next seven days they allowed him by cheques drawn in the ordinary way to overdraw his account to an amount somewhat less than 1,000*l.* The plaintiff filed his bill for delivery up of the deeds, alleging the memorandum of deposit to be a forgery, and also alleging that the bank had not lent the brother 1,000*l.* for seven days. It was held that, even if it were assumed that the memorandum was not a forgery, the plaintiff was entitled to recover possession of his deeds, because the bank had not complied with the consideration stated in the memorandum.

A banker who has agreed with a customer to allow him an overdraft cannot refuse to honour drafts within the agreed limit which have been drawn and put in circulation before the customer has received notice of the determination of the arrangement (e).

Whether a banker who has agreed to allow an overdraft until a certain date can, before that date, give notice that it is no longer to continue, and at once sue the customer for the amount to which he has then overdrawn, is doubtful (e).

9 A. C. 857. *In re Cefn Cilcen Mining Co.* (1868), 7 Eq. 88, and *Waterlow v. Sharp* (1869), 8 Eq. 501, in which the contrary view was apparently taken, must be considered to be overruled.

(d) (1873), 8 Ch. 932.

(e) Per Lord Herschell in *Rouse v. Bradford Banking Co.*, [1894] A. C. 586, at p. 596.

CHAPTER II.

DISCOUNTING.

Nature of Discounting.

DISCOUNTING, as carried on by bankers, is essentially a form of lending (*a*).

A bill is discounted when, in consideration of a sum paid by the banker, the transferor indorses it to him, or when, without indorsement, he becomes liable to the banker by agreement or custom in respect of the payment of the amount of the bill.

The discount is the deduction or drawback made upon an advance of money upon a bill: the difference between the price paid and the amount of the debt, the evidence of which is transferred (*b*).

The advance upon every bill or note discounted, without reference to its character as business or accommodation paper, is properly denominated a loan, for interest is predicable only of loans, being the price paid for the use of money (*c*).

A bill is bought when, in consideration of a sum paid, it is transferred without indorsement and the transferor does not become responsible to the person who takes it for its payment. But, among business men, the "sale" or "purchase" of a bill has a different significance. It means a transaction by which a person desiring to remit money to a distant place obtains a bill drawn upon that place by one who has a correspondent there (*d*).

(*a*) See *Fleckner v. Bank of the United States* (1823), 21 U. S. R. (8 Wheaton) 338, at p. 350.

(*b*) *In re Land Securities Co., Ex parte Farquhar*, [1896] 2 Ch. 320.

(*c*) Per Matthews, J., in *National Bank v. Johnson* (1881), 104 U. S. R. 271, at pp. 276, 277.

(*d*) See *Misa v. Currie* (1876), 1 A. C. 554.

A bill is pledged when the holder, in consideration of a loan, deposits the bill with the lender merely as a security. In this case the interest of the lender in the bill is limited to the amount secured by the deposit (*e*).

It is convenient to bear in mind that the word "discount" is often used in a very elastic and comprehensive sense.

"By the language of the commercial world and the settled practice of banks, a discount by a bank means, *ex vi termini*, a deduction or drawback made upon its advances or loans of money upon negotiable paper or other evidences of debts payable at a future day, which are transferred to the bank. . . . If, therefore, the discounting of a promissory note, according to the usage of banks, be a purchase . . . it is a purchase by way of discount" (*f*).

Whether a bill has been deposited or discounted depends not merely upon the fact of indorsement, but upon the intention of the party remitting it. Indorsement is *primâ facie* evidence of discount. But if the bill is remitted indorsed merely to enable the person receiving it to raise money to meet future advances, while retained it is a mere deposit applicable to the demands of the remitter. The question is whether the indorsement was intended to effect an absolute transfer, giving full power to go against all parties on the bill, or merely to enable the person with whom it is deposited to receive the amount from the other parties (*g*).

Position of Banker.

Holder in Due Course.—The banker is, of course, a holder for value (*gg*).

In *Carstairs v. Bates* (*h*) the assignees of certain bankrupts sued the defendant as acceptor of a bill of exchange drawn by Allport, payable to his own order and indorsed by him to the bankrupts. The latter, who were Allport's bankers, had discounted the bill for him and credited him with its amount and debited him with the discount, so that deducting the discount it was placed to his account

(*e*) *Reid v. Furnival* (1833), 1 Cr. & M. 538.

(*f*) Per Story, J., in *Fleckner v. Bank of U. S.*, see note (*a*) on the preceding page.

(*g*) *Ex parte Twogood* (1812), 19 Ves. 229. As to indorsement for collection, see pp. 360, 470, *supra*.

(*gg*) Cf. pp. 789—790, *infra*.

(*h*) (1812), 3 Camp. 301.

as cash, which he might immediately have drawn out. It being contended on behalf of the defendant that the action could not be maintained as the bill remained the property of Allport, Lord Ellenborough said: "Is it meant seriously to contest the right of the assignees to recover in this action? The bankers were the purchasers of this bill. They did not receive it as the agents of Allport. The whole property and interest in the bill vested in themselves, and they stood all risks from the moment of the discount. If the bill had been afterwards stolen or burnt, theirs would have been the loss. In *Giles v. Perkins* (i) the bankers were mere depositaries, with a lien when the account was overdrawn. The customer there drew upon the credit of the bills deposited. Here Allport might have drawn out the amount of the bill, deducting the discount, as actual cash, in the same manner as if he had discounted the bill with a third person, and then paid in the amount in bank-notes. The discount makes the bankers complete purchasers of the bill; the transaction was completed; they had no lien, but the thing itself; the bill was as much theirs as any chattel they possessed. This very distinction was taken in the case cited; for it was there said, 'If the banker discount the bill, or advance money upon the credit of it, that alters the case; he then acquires the entire property in it, or has a lien on it *pro tanto* for his advance.'"

So where a customer gets his banker to discount a bill at a time when his account is overdrawn, and the amount is simply carried to the credit of his account, the banker is a holder for value (k).

In *Atwood v. Crowdie* (l) A. & Co., bankers in the country, being pressed by B. & Co., bankers in town, to whom they were indebted, to send up any bills that they could procure, transmitted for account an accommodation bill accepted by D. When the bill became due, the balance was in favour of A. & Co., but the bills were not withdrawn, and afterwards the balance between the two houses turned considerably in favour of B. & Co., and was so when A. & Co. became bankrupts. It was held that B. & Co. were entitled to recover against the acceptor.

(i) See p. 461, *supra*.

(1862), 31 Beav. 39.

(k) *In re Carew's Estate Act* (No. 2)

(l) (1816), 1 Starkie, 483.

Bills of exchange indorsed by a customer to his banker in order that they may be discounted, and held by the banker "pending discount," *i.e.*, pending inquiries as to the solvency of the acceptors, the banker meanwhile making some advances to the customer on the credit of the bills, are not securities, which the banker, in proving in the customer's bankruptcy for the amount due to him by the customer, is bound to value. The banker is entitled to prove for the full amount due to him, and also to recover what he can from the other parties to the bills, provided that he does not receive in the whole more than twenty shillings in the pound (*m*).

"Although," said Lord Justice James, "at the moment before the indorsement the bill was property of the customer which he was indorsing, that is, he had a right to sue the acceptor, and a right to sue any prior indorser, as it might have represented the value of goods sold by him, yet when it was taken to the banker under such circumstances as in the present case, taken by the customer with his indorsement on it, it was taken by him as borrower to the banker as lender, as being an instrument exactly the same in effect as if all the parties to it had then at that moment joined in giving their personal security for the debt" (*m*).

In the absence of special agreement, the banker cannot anticipate his rights during the period covered by the discount.

In *Rogerson v. Ladbroke* (*n*) A.'s bankers for nine or ten years previous to his death, had been in the habit of accommodating him with a loan of 1,000*l.* upon the security of his promissory note, which was renewed every three months, the bankers, upon those occasions, discounting the note by placing the amount of it to the credit of A., as cash paid in by him, and debiting him on the other side with the discount. A. also, about two months prior to his death, accepted, payable at his bankers, a bill drawn by B. on A. for 467*l.*; this bill having been paid away by B., was discounted by the bankers for a holder who did not indorse it, and the bankers were the holders when the bill became due. On the morning the bill became due, before the arrival of the post the bankers who had then in their hands 1,421*l.* of A.'s money, wrote off the bill to

(*m*) *Ex parte Schofield, In re Firth Brett, In re Howe* (1871), 6 Ch. 838. (1879), 12 Ch. D. 337. Cf. *Ex parte* (*n*) (1822), 1 Bing. 93.

the debit of A.'s account. The same day's post informing them of A.'s death two days before, they called upon B. to pay, and B. paid them 40*l.* on account of the bill, on a representation from them that 40*l.* would be wanting to make A.'s account right. At this time, the last promissory note for 1,000*l.*, given by A. to the bankers, had fifty-three days to run, but the bankers immediately entered that note, as well as the bill of exchange, to the debit of A.'s account, allowing on the other side a rebate of discount for the time the note had to run. The executors of A., having, before the fifty-three days expired, sued the bankers for the balance in their hands at the time of A.'s death, it was held, that the bankers might set off against the demand of the executors the 467*l.* written off on the bill of exchange, but not the 1,000*l.* on the promissory note.

"The discount having been deducted," said Chief Justice Dallas, "the notes having three months to run and the defendants having endeavoured, on the death of the testator, to raise a new transaction, and allow a rebate of interest, without any previous consent on his part, shows that the transaction was not one continued loan. . . . The defendants had no right thus to change the nature of the transaction."

With this case it is well to contrast *Alsager v. Currie (o)*. There the defendants, who were bankers, had, previously to the 24th of October, 1842, discounted bills to a large amount for certain customers, who became bankrupts on that day, at which time the defendants had in their hands a balance of 179*l.* 19*s.* 11*d.* belonging to them. The bills were indorsed by the bankrupts in blank, and two of them were paid by the acceptors before the bankruptcy; the others, far exceeding in amount the sum of 179*l.* 19*s.* 11*d.*, did not become due until the 16th of November and other subsequent days. The action, which was for money lent, &c. (being the balance of a banking account alleged to be due to the bankrupts at the time of their bankruptcy), was commenced on the 2nd of November, 1842, and on the 8th of the same month the defendants proved against the bankrupts' estate the whole of the bills, except the two which had been paid, deducting the balance of 179*l.* 19*s.* 11*d.*

(o) (1844), 13 L. J. Exch. 203; 12 M. & W. 751.

It was held that the defendants, as indorsees of the bills, were entitled to set them off in the action.

Notice of Defect in Title.—In the absence of evidence of notice, a banker who has discounted a bill will be presumed to be a holder in due course (*p*).

Mere carelessness on the part of the banker in discounting a bill is not sufficient to exclude his right to payment of it. He is entitled to discount a bill on the credit of the acceptor without having any knowledge of the person holding it; and, provided the transaction is honest, he can recover upon the bill (*q*).

“But negligence or carelessness, when considered in connection with the surrounding circumstances, may be evidence of *mala fides*” (*r*).

In *In re Gomersall* (*s*) traders in the country accepted bills fraudulent against their creditors for 1,727*l.* drawn on them by their London agent. The agent sold the bills for 200*l.* Three days after the sale the traders presented a petition for liquidation; and they were afterwards made bankrupts. It was held that, under the circumstances, the purchaser of the bills must be taken to have had notice that the bills were fraudulent on the creditors of the traders, and should be allowed to prove in the bankruptcy only for the sum paid by him for the bills.

In the course of his judgment, Lord Justice Mellish said (*t*): “The present case . . . is not a case of an advance on the credit of a bill, but is the case of the purchase of the entire value of the bill; and, in my opinion, the Chief Judge held rightly that, in the case of the purchase of the entire value of the bill, if there be nothing else to affect the right of the holder, he may prove and receive dividends on the full amount, just as he might maintain an action against both the drawer and the acceptor for the full amount. . . . If there are such facts as, in the mind of a Court or jury, or any reasonable man, would leave no doubt that the case was tainted with fraud, and not only that, but that the holder of

(*p*) *Middleton v. Barned* (1849), 4 Ex. 241.

(*q*) See *Raphael v. Bank of England* (1855), 17 C. B. 161; 25 L. J. C. P. 33, and Chap. 7, Sect. 4 of this Part.

(*r*) Per Baggallay, L. J., in *In re Gomersall* (1875), 1 Ch. D. 137, at p. 146.

(*s*) See last note.

(*t*) At pp. 142—5.

the bills must have known what the particular fraud was, he must be held in that case to have had notice of the fraud. Now, let us see what the case is here. The bills are dated back. Possibly Jones did not know when they were drawn, but I need not go into that question. He manifestly knew that both parties were hopelessly insolvent, probably that the drawer could pay nothing at all, but that the acceptors, although likely to become bankrupt, had assets sufficient to pay a dividend. What right had he to suppose that an utterly insolvent drawer—a man who would do such a thing as sell bills for 200%, and in a short time afterwards have a claim against him for 1,700%.—would have kept these bills in his possession for two or three months after they were drawn, never receiving any money at all upon them, if he had had a good claim against the acceptor? It appears to me that, if Jones had not absolutely shut his eyes, there was sufficient for him to come to the conclusion, looking to the state of both these parties, that these bills were drawn for the purpose of enabling them recklessly to raise money on the eve of bankruptcy. That being so, it appears to me that the Court of Bankruptcy must allow the holder to prove only for the amount actually advanced.”

Limitation on Right of Recourse by Agreement.—“Where bankers discounted for the drawer a bill accepted for his accommodation, and on being informed, after it was dishonoured, of the character of the bill, consented to look to the drawer and not to the acceptor for payment; and afterwards the drawer’s account with them was in his favour by a larger sum than the amount of the bill, it was held that they were bound to have applied the balance in payment of the bill, and that the bill, as against the acceptor, must be considered as satisfied, although the drawer had become insolvent, and was much indebted to the bank for subsequent advances” (u).

Bills given by Banker in Exchange.—Where a person discounting bills with a banker received other bills not indorsed by the banker as the discount, and these bills were not met, it was held that he could not recover upon them against the banker (x).

(u) Chitty on Bills of Exchange, 11th ed. p. 290, citing *Marsh v. Houlditch*

(1818), see note (p) on that page.

(x) *Fyddell v. Clark* (1796), 1 Esp. 447.

Liability of Customer.

A transferor of a bill by delivery is not liable on the instrument (y). Accordingly, if a holder discounts with a banker a bill which is negotiable by delivery, without indorsing it, he is not liable to the banker if it is dishonoured (z), provided the bill is what it purports to be, and he had a right to transfer it and was not at the time of transfer aware of any fact which rendered the bill valueless (a).

"If there is an antecedent debt and a bill is taken without taking an indorsement, which bill turns out to be bad, the demand for the antecedent debt may be resorted to. It has been held that, if there is no antecedent debt and A. carries a bill to B. to be discounted, and B. does not take A.'s name upon the bill, if it is dishonoured, there is no demand; for there was no relation between the parties except that transaction; and the circumstance of not taking the name upon the bill is evidence of a purchase of the bill" (b).

In *Emly v. Lye* (c) one of two partners had drawn bills of exchange in his own name, which he procured to be discounted with a banker through the medium of the same agent who procured the discount of other bills drawn in the name of the partnership firm with the same banker, and the proceeds were carried to the partnership account. The banker conceived, at the time of discounting them, that all the bills were drawn on the partnership account. It was held that the banker had no remedy against the partnership, either upon the bills so drawn by the single partner, or for money had and received through the medium of such bills: the money having been advanced solely on the security of the parties whose names were on the bills, by way of discount, and not by way of loan to the partnership.

Forged Bill.—Where the bill is forged it is not what it purports

(y) Bills of Exchange Act, s. 58 (2).

(z) *Bank of England v. Newman* (1700), 1 Ld. Raym. 442. If, on the other hand, a bill is deposited against an advance, upon its dishonour, the depositor will remain liable for the debt:

Gwatkin v. Campbell (1854), 1 Jur. N. S. 131.

(a) Bills of Exchange Act, s. 58 (3).

(b) Per Lord Eldon in *Ex parte Blackburne* (1804), 10 Ves. 204, at p. 206.

(c) (1812), 15 East, 7.

to be (d), and, accordingly, the banker who has discounted it, without taking the transferor's indorsement, will be able to recover the amount which he has paid to him.

In *Jones v. Ryde* (e) it was held that a person who had discounted a forged navy bill for another, who passed it to him without knowledge of the forgery, might recover the money.

So where a banker had advanced money upon Exchequer bills which were afterwards repudiated at the Exchequer Office on the ground that the Comptroller's signature to them was forged, he was held entitled to recover in an action for money lent (f).

So in *Fuller v. Smith* (g) the plaintiffs, who were bankers, had discounted for the defendants, who were bill brokers, a bill of exchange which the latter did not indorse. The signatures of the drawer and acceptor (the latter of whom kept an account with the plaintiffs) were forged. It was held that the defendants were liable to refund the money, and that the fact of their having paid over the amount to the indorsee for whom they were brokers, would not relieve them from their liability.

In *Gurney v. Womersley* (h) the defendants, bill brokers, having received from A. a bill of exchange drawn and indorsed by A., for the purpose of being discounted, took it to the plaintiffs, who were money lenders, with whom the defendants had previously had similar dealings; and, acting as principals, the defendants procured the bill to be discounted by the plaintiffs, without, however, indorsing or guaranteeing it, though asked by the plaintiffs to do so. The rate of discount charged by the defendants to A. exceeded that charged by the plaintiffs to the defendants. The acceptance to the bill turned out to have been forged by A., and the bill proved valueless. It was held that the plaintiffs were entitled to recover the sum paid to the defendants upon the discount of the bill as upon a failure of consideration.

Lord Campbell, C. J., said: "It seems to me quite clear, in a transaction of this sort, that the dealing between the money dealer

(d) See Bills of Exchange Act, s. 58 (2).

(e) (1814), 5 Taunt. 488.

(f) *Bank of England v. Tomkins* (1842),
6 Jur. 347.

(g) (1824), 1 C. & P. 197; Ry. & M.
49.

(h) (1854), 24 L. J. Q. B. 46; 4 El.
& Bl. 133; 3 C. L. R. 3; 1 Jur. N. S.
328.

and the bill broker is a separate transaction from the dealing between the owner of the bill and the bill broker; and, as between these parties, I think it immaterial whether the bill broker discounts himself or applies to a money lender to do so. The contracts here are separate; there is one contract between the plaintiffs and the defendants, and another between the defendants and Anderson; and the defendants dealt as principals and were responsible for the genuineness of the bills The defendants, though not liable for the solvency of the parties to the bill, are liable for the genuineness of the instrument and for its being what it purported to be. Here, that which purported to be the acceptance of one of the parties to the bill, and upon which the plaintiffs relied, was a forgery and of no value whatever. In fact the instrument altogether became of no value, for Anderson was a bankrupt and was convicted of the forgery. There was, therefore, clearly a failure of consideration, entitling the plaintiffs to recover."

An agent's position is, however, different in this respect from that of his principal.

In *Ex parte Bird*, *In re Bourne* (i), an agent applied to a banking company on several occasions to discount bills drawn by his principal, and at the commencement of these transactions informed the company who the drawer and acceptors were, and inquired whether the company would discount the bill without requiring the agent to indorse it. They agreed to do so in this and other instances, but upon some of the bills required and obtained the agent's indorsement. The acceptances turned out to have been forged by the principal, of which fact the agent was wholly ignorant. On the agent becoming bankrupt, and there being nothing to show that he had not handed over the proceeds of the bills to the principal, or that those proceeds were in such a position that they could be recalled, it was held that the company could not prove upon the bills which the agent had not indorsed.

Guarantees by Bill Brokers.—In *Ex parte Bishop*, *In re Fox, Walker & Co.* (k), it was proved to be the common and almost invariable practice of bill brokers in the City of London, not to

(i) (1851), 4 De G. & S. 275.

(k) (1880), 15 Ch. D. 400.

indorse each bill of exchange which they have discounted for a customer when they re-discount it with their bankers, but to give to the bankers a general guarantee for all bills which they re-discount with them.

It was held that when an accommodation bill is drawn and accepted for the purpose of raising money for the drawer and the acceptor, the drawer in discounting the bill with bill brokers in the City of London has an implied authority from the acceptor to deal with them in the ordinary course of their business, and, consequently, that the bill brokers have an implied authority from the acceptor to make themselves liable on the bill under their guarantee to their bankers, and are, in the event of the bankruptcy of the acceptor, entitled to prove against his estate for what they have paid to the bankers in respect of the bill under their guarantee.

Marginal Receipts.

A marginal receipt or note is a document whereby a banker who, on discounting a bill, reserves a portion of the sum agreed as the amount to be credited to his customer in respect thereof, undertakes to pay the sum so reserved to the person to whom he gives the document, if and when he receives intelligence that the bill has been duly paid.

These documents were formerly very commonly given by Indian bankers, but during the last quarter of a century their use has declined, and at the present time they are comparatively rarely seen in London (*l*).

In *Jeffryes v. Agra and Masterman's Bank* (*m*) one Speltz had discounted with the bank bills of exchange drawn against goods consigned to India, handing over the bills of lading as security. The bank at once paid over to him, or placed to his credit in his

(*l*) A similar object may be attained by the customer signing a memorandum whereby he undertakes, as security for the due payment of discounted bills, that his balance on the current account with his banker shall not at any time be less than a certain sum, and agrees that the banker shall at all times be at liberty to retain that balance during the

currency of the bills and until they have been duly paid, and that no temporary reduction which may be allowed in that balance shall be considered a waiver of the right of the banker to require the same to be restored to, and maintained at, the stated minimum amount.

(*m*) (1866), 2 Eq. 674; 35 L. J. Ch. 686; 14 W. R. 889.

banking account, somewhat less than the full discount value of the bills at that date, and retained the difference between the sums so placed at his disposal and the full value of the bills to provide against any actual fall in the value of the goods, and by way of complete security to the bank for the payment in full at maturity of the bills so discounted. For the balance or margin thus retained the bank in each case handed to Speltz a memorandum of receipt, in the following terms:—

“Received on account of L. Speltz, Esq., the sum of £——, to be held by this bank as security for payment of bills as over-dated 22nd April, 1864, on Messrs. Passmore & Co., Bombay, and to bear interest at 1 per cent. below the Bank of England minimum rate, but not to exceed 3½ per cent. per annum.”

The amounts for which the bills referred to were drawn were indorsed upon this memorandum.

Speltz deposited three of these receipts with the plaintiffs, who gave notice to the bank. The bills having been duly honoured, it was held that the bank were entitled to set off against the sums due from them upon such receipts such sums as were actually due and payable to them by Speltz at the times when the marginal receipts respectively became payable, in respect of liabilities contracted before notice of the deposit was received, but not to a lien for sums not actually due (*n*).

Vice-Chancellor Page Wood, in the course of his judgment, said: “I take it, as between Speltz and the bankers, that at all times when the bills became due they would have been entitled to set off any moneys actually due from him to the bank, whatever the account should be. As to mere liabilities, it is equally clear that they could not set them off. How, then, is the case affected by the notice they received of the assignment of this debt on the part of Speltz? I apprehend that they cannot be in any worse position as to liabilities actually accrued before they had notice of the assignment, not matured when they had notice of the assignment, but matured when the debt became payable. They would have a right to say: ‘We held all these various securities, we knew all our rights of set-off, we knew that when these became due there would be other debts due at the same time, and that we should set the one

(*n*) Cf. Chap. 7, Sect. 1, of this Part, “Mortgage by Deposit—Subsequent Advances.”

off against the other ; and our right cannot be interfered with by any dealing of yours with strangers until we have notice of such dealing.' The moment they have notice they cannot claim a set-off in respect of any debts not actually due at the time they received notice of the payment of the bills, for the notice would make them liable at once to be sued in respect of the several sums they had retained."

In *Ex parte Kemp, In re Fastnedge (o)*, the facts were as follows :—Messrs. Fastnedge & Co. were exporters of goods to India, and were in the habit of selling the bills drawn by them against the consignments upon the consignees in India to bankers in London, with the bills of lading attached as security. The bankers were not accustomed to advance the whole of the price of the bills in cash. They paid 70 per cent. or upwards in cash, and for the rest of the price gave Messrs. Fastnedge what were called in the trade "marginal notes." The effect of these notes was that the bankers giving them contracted to hold the residue of the price of the bills of exchange on deposit, bearing interest, by way of security for the payment of the bills, and that the amount so deposited was not to be paid to Messrs. Fastnedge until advice was received of the due payment of the bills, and was then to be subject to any other claims which the bankers might have against Messrs. Fastnedge. The marginal notes given by the different bankers were not exactly identical in form, but were substantially to the same effect. Those given by the Chartered Bank of India, Australia and China, were in the following form :—

"Chartered Bank of India, Australia and China,

"London, 21 Feb., 1873.

"Bills, Nos. 426, 427 for Rs.839 13 0, purchased	£	s.	d.
at 1/11½	79	3	5
"Paid this day	59	3	5

"Leaving a margin of twenty pounds .. £20 0 0
to be accounted for to Messrs. Fastnedge & Co. on receipt of advice of the due payment of the above bills, and after providing for any deficiency on other liabilities of the said parties to the bank. Interest to be allowed at Bank of England minimum rates, but not to exceed 5 per cent. per annum.

"J. H. SMYTHE, Manager."

These notes were not meant to be transferable, and in some cases the words "not transferable" were written across the face of the document. Messrs. Barbour & Brother were commission agents in Manchester, and had dealings with Messrs. Fastnedge. Since the year 1870 they had been in the habit of selling goods to Messrs. Fastnedge, drawing bills upon them for the price of the goods, and receiving from them marginal notes which had been given them by London bankers, as a security for the payment of such bills. The marginal notes in question in the present case were all given by different bankers to Messrs. Fastnedge & Co. previous to the month of March, 1873, and were indorsed by Messrs. Fastnedge to Robert Barbour & Brother, and deposited with them as a security for the price of goods sold by Robert Barbour & Brother to Messrs. Fastnedge. On the 26th of March, 1873, Messrs. Fastnedge presented a petition for liquidation by arrangement. At that time no notice had been given to the various bankers that the marginal notes had been assigned to Robert Barbour & Brother. Messrs. Fastnedge inserted the name of Robert Barbour & Brother in the list of their creditors for 3,500*l*. At the time the petition for liquidation was presented none of the bills of exchange in respect of the price of which the marginal notes were issued had been accepted, but since that time they had all been accepted and paid, and the bankers were willing to pay the sums of money represented by the marginal notes to whoever was legally entitled to receive such sums. Under these circumstances the trustee claimed the sums represented by the marginal notes as having been within the order and disposition of Messrs. Fastnedge at the commencement of the liquidation.

Lord Justice Mellish held that these sums were not debts due to the bankrupt in the course of his business within the order and disposition clause of the Bankruptcy Act, 1869, s. 15 (5), and accordingly that they ought to be paid by the banks to Messrs. Barbour & Brother. In the course of his judgment, the Lord Justice said: "I have next to consider whether the sums represented by the marginal notes had become debts due from the respective banks to Messrs. Fastnedge & Co. before their petition for liquidation was presented. Now, it is obvious that at that time not only had these sums not become payable—which, in my

opinion, would not prevent their being debts—but it was wholly uncertain whether any sum would ever become payable to Messrs. Fastnedge at all in respect of them. It was argued by Mr. Benjamin that, nevertheless, they were debts due to Messrs. Fastnedge, because the sums represented by the marginal notes were, as he said, to be paid to Messrs. Fastnedge in all events, either by being paid to them in cash or by being applied to discharge liabilities owing by them. I do not think this argument is sound. In *Jeffryes v. Agra and Masterman's Bank* (p) Vice-Chancellor Wood thus describes the legal effect of marginal notes: ‘These documents, in truth, represent a debt due from the bank, with an engagement to pay that debt to the person to whom they give the receipt note upon a certain condition and at a certain time, as far as that time is defined by the condition, namely, whenever they receive intelligence that the bills in respect of the discount of which they reserved this right of retainer have been duly paid and satisfied. It is, in other words, a debt which will accrue from the bank on that event happening.’ Lord Hatherley had not the point I am considering before him at all, and although the words he first uses, that the documents represent a debt due from the bank, are favourable to the argument of the appellant, I think his last description is more accurate, that the debt will accrue from the bank on the event happening. If, notwithstanding the bills were dishonoured, an action was brought against the bank to recover the sums represented by the marginal notes, the proper plea to raise the defence of the bank would be a plea of never indebted, and not a plea of payment or of set-off. . . . Now it is obvious that Messrs. Fastnedge did not assign to Robert Barbour & Brother, and Robert Barbour & Brother did not become the true owners of sums certain to be paid by the banks to Messrs. Fastnedge in all events, but Messrs. Fastnedge only assigned to Robert Barbour & Brother, and Robert Barbour & Brother only became the owners of contingent claims which might or might not end in becoming debts. In my opinion contingent claims of this kind are not debts due within the 5th sub-section of the 15th section.”

(p) See p. 598, *supra*.

CHAPTER III.

THE BORROWER.

"BANKERS generally do accommodate their customers by allowing . . . overdrafts to some extent; when they do so the legal effect is that they lend the surplus to the customer, and if the person drawing the cheque is authorized to borrow in this way on account of the customers, the bankers can charge the amount against those customers and their principals, and can make available any securities which, either from the general custom of bankers or from a special bargain, they have to secure their account" (a).

So where a banker in any other way makes an advance to his customer, he can, of course, usually charge the amount against the customer.

But if the cheque is drawn, or the advance is otherwise received by a person who is not himself the customer, or by the officers of a corporation, difficult questions may arise.

In this connection reference should be made to what is said above, on pp. 135—137 and 269—274.

The following general propositions may be advanced:—

I. The banker can require repayment of a loan by a person who, being competent to contract, requested, or by his conduct induced, the banker to give credit to him in the matter.

II. The banker can require repayment of a loan by a corporation where the latter had power to borrow to its extent, and the loan was made upon the request of persons empowered to bind the corporation in that behalf.

(a) Per Lord Blackburn in *Brooks & Co. v. Blackburn Benefit Society* (1884), 9 A. C. 857, at p. 864.

INDIVIDUALS.

Where the banker has relied upon the credit of an individual, the questions which arise are:—(a) Was he competent to bind himself personally? (b) Did he in fact do so?

Capacity to Contract.

Married Women.—A married woman who borrows money makes a valid contract to repay it, whether or not she has separate property at the time (b). But the contract can be enforced only against such separate property as she has at the time when execution is levied, and which she is not restrained from anticipating. She does not become personally liable upon her contracts like a man or an unmarried woman (c).

Infants.—An infant cannot bind himself in any way to repay money lent to him. Any engagement on his part to do so is absolutely void (d). Accordingly, the account of an infant cannot with safety be allowed to be overdrawn.

Persons of Unsound Mind.—A person *non compos mentis* at the time of entering into a contract can avoid the contract if his condition can be shown to have been known to the other party (e).

Intoxicated Persons.—A person who at the time when he purports to enter into a contract is, to the knowledge of the other party, so intoxicated as to be entirely deprived of sense, understanding, and the use of his reason, and, accordingly, unable to comprehend the meaning, nature, or effect of the contract, can afterwards either avoid (f) or affirm it (g).

(b) Married Women's Property Act, 1893 (56 & 57 Vict. c. 63), s. 1.

(c) See Annual Practice, Notes to Ord. XVI. r. 16; *Brown v. Dimbleby*, [1904] 1 K. B. 28; *Birmingham Excelsior Money Society v. Lane*, [1904] 1 K. B. 35.

(d) The Infants' Relief Act, 1874 (37 & 38 Vict. c. 62), s. 1. See *In re Soltyskoff, Ex parte Margrett*, [1891] 1

Q. B. 413; *Nottingham Permanent Benefit Building Society v. Thurstan*, [1903] A. C. 6.

(e) *Molton v. Camroux* (1848), 2 Ex. 487; *Imperial Loan Co. v. Stone*, [1892] 1 Q. B. 599.

(f) *Gore v. Gibson* (1845), 13 M. & W. 623.

(g) *Matthews v. Baxter* (1873), L. R. 8 Ex. 132.

The Real Customer.

It is sometimes difficult to determine whose credit was in fact pledged to the banker. This is a question to be decided upon the construction of documents or the other facts of the case.

In *Eaton v. Bell* (*h*) an Inclosure Act empowered the commissioners to make a rate to defray the expenses of passing and executing the Act; and enacted that persons advancing money should be repaid out of the first money raised by the commissioners. To defray expenses incurred in the execution of the Act, the commissioners drew drafts upon their bankers in the following form: "Fordham Inclosure, October 15th, 1810. Messrs. Eaton, Hammond & Son, pay — or bearer — pounds on account of the public drainage and place the same to our account, as commissioners of the above inclosure." The bankers, during a period of six years, continued to advance considerable sums by paying these drafts. Although certain rates were made, the plaintiffs were greatly in advance to the defendants from the commencement of the account in 1809 down till 1818, when the account stood at the amount for which the action was brought. It was held that the commissioners were personally responsible to the bankers for the drafts made as above stated.

In *Coutts & Co. v. The Irish Exhibition in London and others* (*i*) the facts, so far as material to the present purpose, were shortly as follows:—In April, 1888, six gentlemen formed themselves into a council with the view of establishing an Irish Exhibition in London, and four of them, with the authority of the others, opened an account with the plaintiffs in the name of "The Irish Exhibition," on the understanding that cheques might be drawn by any two of the council with the countersignature of the member who acted as honorary secretary, and that they should be allowed to overdraw to the amount of 10,000*l.* for the purpose of the exhibition. On the 21st June, 1888, the Irish Exhibition was incorporated under the Companies Act, 1862, by the name of "The Irish Exhibition in London," and the plaintiffs received notice of the

(*h*) (1821), 5 B. & Ald. 34.

and, on appeal, 7 T. L. R. 313; W. N.

(*i*) (1890), 63 L. T. 489; 7 T. L. R. 6; (1891) 41.

fact. No alteration, however, was made in the heading of the account, which was then considerably overdrawn, and cheques continued to be drawn as before. The exhibition was not successful, and the plaintiffs in the autumn of 1888 continually pressed for a reduction of the overdraft or for security; and on the 12th October, 1888, one of the six gentlemen before referred to sent to the plaintiffs a document, not under seal, purporting to be an equitable charge by the Irish Exhibition in London on certain specified book debts in favour of the plaintiffs to secure the overdraft. On the 8th November, 1888, the exhibition executed under seal an assignment of all its assets in favour of the National Agricultural Hall Company, for value. On the 15th December, 1888, the exhibition was ordered to be wound up, and at that time the overdraft was about 4,000*l*. The National Agricultural Hall was also ordered to be wound up. The plaintiffs brought this action to enforce their charge against the two companies, and in the alternative to make the above-mentioned six gentlemen personally liable for the overdraft. Mr. Justice Kekewich having decided in favour of the defendants, the plaintiffs appealed; the only question argued upon the appeal being as to the position of the six gentlemen who had opened the account.

In giving judgment in favour of the plaintiffs, Lord Justice Lindley said that in April, 1888, there was no incorporated society, no body, in fact, with whom Messrs. Coutts could deal except the respondents. The ordinary relation of banker and customer must be held to have existed between Messrs. Coutts and these gentlemen, unless it could be made out that Messrs. Coutts were not to be the creditors of anybody until the exhibition was formed. Although in one sense the account was an impersonal account, being in the name of the Irish Exhibition, still, when a cheque was drawn by any two gentlemen of the council and countersigned, as provided in the letter of the 18th of April, the legal effect was to make liable those gentlemen at whose request the money was paid. It was incredible that Coutts & Co. only expected to be paid their overdraft if the exhibition was a success, or that they desired to finance the exhibition. There could be no doubt that they looked to the members of the council as their customers. It was contended that, even if these gentlemen were

originally responsible, the plaintiffs had accepted the liability of the Irish Exhibition in London when it was incorporated. In June, 1888, when the company was formed, the plaintiffs had notice of it; but nevertheless they went on precisely in the same way as before, and made no change in their account; and the account was overdrawn from the commencement till the action was brought. It was absurd to suppose that Messrs. Coutts had substituted as their debtors such a company as this for six gentlemen of responsibility.

Agency.—Where the banker has given credit to an individual at the request of a person whom the banker believes to be his duly authorized agent, the question will be whether the former had in fact authorized the latter, or, if not, whether he had, by his conduct, induced the belief on the part of the banker that he had. In other words, the general principles which determine the scope of the liability of a person upon the contract of one who purports to act as his agent will apply (*k*).

An agent cannot bind his principal by borrowing money, either by overdrawing an account or otherwise, without either an express or implied previous authority, or an authority to be inferred from the subsequent recognition by the principal of his conduct. If the principal knows that the agent is overdrawing the account the inference is very strong that he has actually authorized such a course of business, and he may be held liable accordingly (*l*).

Excess of Authority.—If the banker knows that the agent is exceeding the scope of his actual authority, the principal will not be liable to him.

In the case of the *London Chartered Bank of Australia v. McMillan* (*m*) it appeared that, in pursuance of an arrangement between the bank and the Government of New South Wales, the Registrar-General opened an account which, to the knowledge of the bank, was simply for the purpose of the daily lodgment of the collections of his department and the weekly transferring by his cheque of such

(*k*) *Maddick v. Marshall* (1864), 17 N. S. 829; 8 L. T. 645.
 C. B. N. S. 829; *Summers v. Solomon* (*l*) Per Rolfe, B., in *Pott v. Bevan*
 (1857), 26 L. J. Q. B. 301; *Pole v.* (1844), 1 C. & K. 335.
Leask (1862), 33 L. J. Ch. 155; 9 Jur. (*m*) [1892] A. C. 292.

lodgments to the Treasury. The cashier sent to lodge such moneys for a considerable period kept back a part thereof, concealing his fraud by means of forged receipts by a fictitious clerk of the bank as acknowledging the receipt of the full amount of the money he should have lodged. The Registrar-General accordingly drew his cheques in favour of the Treasury for the weekly totals which purported to have been lodged. This resulted in an overdraft to the extent of 6,127*l.*, of which he was ignorant, and which the bank omitted to bring to his notice. The bank sued the Government of New South Wales to recover this amount. It was held that the Government were not liable, inasmuch as they had only received the amount which had been actually collected, and which the bank, by honouring the weekly cheques, represented that it had received in lodgment. The overdrafts by the Registrar-General were not merely without authority, but were outside the scope and object of the lodgments, and of the drawing therefrom.

Lord Morris, in delivering the judgment of the Privy Council, said: "The bank undertook the departmental business of receiving money and paying *it* out on cheques; the bank knew that the account opened with them by Ward" (the Registrar-General) "was simply an account for the purpose of the daily lodgment of the collections of his department, and the transferring by his cheque of such lodgments to the Treasury weekly. Ward's cheque was the mode of transfer to the Treasury account of the money lodged by him. The Government in no way gave authority to Ward, or led the bank to suppose that Ward had any authority to overdraw by his cheques; and the bank knew, or should have known, that any overdraft was entirely outside the scope and object of the lodgments, and of the drawing against such lodgments."

In *Jacobs v. Morris* (*n*) the plaintiff carried on business as a tobacco merchant in Melbourne, Australia, under a firm name. He also had a London office bearing the firm name, at which the business of purchasing and paying for goods in London and shipping them to Melbourne was carried on. While absent in Australia he appointed an agent at the London office, under a power of attorney, describing him (the plaintiff) as of Melbourne, trading

as a tobacco merchant under the firm name, and authorizing the agent for him (the plaintiff), and in his name, or in his trading name, "to purchase, and to make any contract for the purchase, of any goods in connection with the business carried on by me as aforesaid," and to make such purchase either for cash or on credit, with power to modify or cancel the contracts for purchase, and, "where necessary in connection with any purchase made on my behalf as aforesaid, or in connection with my said business," to make, draw, sign, accept, or indorse any bills of exchange or promissory notes, which should be requisite or proper in the premises, and to sign the plaintiff's name, or his trading name, to any cheques on his banking account in London. The agent, purporting to act under the power of attorney, obtained a loan of 4,000*l.* from the defendants, a firm of cigar merchants in London, who had previously had frequent business dealings, including loan transactions, with the plaintiff. On applying for the loan the agent, who was well known to the defendants, represented that the power of attorney authorized him to borrow money, and that the loan was required for the purposes of the plaintiff's business. At the same time he produced to them the power itself, but, being satisfied with his assurances, they did not read it. On receiving the 4,000*l.* the agent handed to the defendants as security bills of exchange for the amount accepted in his own name *per pro.* the plaintiff's firm. He then paid the 4,000*l.* into the plaintiff's London banking account, drew it out by cheques drawn by him under the power, and applied it to his own use. The plaintiff, being at that time in Australia, had no knowledge of the loan transaction.

In an action by him against the defendants to restrain them from negotiating the bills upon the ground that they had been accepted without his authority, and upon a counter-claim by the defendants against the plaintiff for the 4,000*l.*, as money had and received by him to their use, it was held, (1) upon the construction of the power of attorney, that it gave the agent power to purchase only, with such powers as were necessarily implied by the appointment of the agent as purchasing agent, and did not confer authority to borrow; and (2) that the primary cause of the loss of the 4,000*l.* was the neglect by the defendants of ordinary business precautions when lending the money to the agent, and that they were therefore

estopped by this neglect, and also by constructive notice that the agent had no power to borrow, from claiming it as money had and received by the plaintiff to their use (*o*).

Securities Entrusted to Agent.—Where a principal entrusts an agent with securities, and instructs him to raise a certain sum upon them, and the agent borrows a larger sum upon the securities, and fraudulently appropriates the difference (the lender acting *bonâ fide*, and in ignorance of the limitation), the principal cannot redeem the securities without paying the lender all he has lent, although the agent has obtained the loan by fraud and forgery, and although the lender did not know that the agent had authority to borrow at all, and made no inquiry.

In *Brocklesby v. Temperance Building Society* (*p*) Lord Macnaghten said: "A person places his title-deeds under the control of an agent and instructs the agent verbally to procure for him a certain sum by means of those deeds. The agent then obtains from a banker, on the security of the deeds, an advance in excess of the amount which the principal directed or intended him to raise, and misappropriates the difference. Who is to bear the loss? Is the principal to suffer for the fraud of his agent, or the banker, who, on the invitation of the principal, has dealt in good faith with the agent in the very matter intrusted to his agency? It would seem to be in accordance with common sense that the loss should fall upon the principal. No authority has been produced to the contrary; and the judgment under appeal is in accordance with the principle of the decision in *Perry-Herrick v. Attwood* (*q*), though the facts of the two cases are different. The principle laid down in *Perry-Herrick v. Attwood* seems to be this: if a person permits title-deeds, which belong to his security, to be dealt with for the purpose of creating a preferential charge of a definite amount, and the limit is exceeded, he cannot, as against innocent third parties who have advanced their money without notice of the limit, complain that the authority which he gave has been exceeded in that respect. *Perry-Herrick v. Attwood* was not a case of

(*o*) See also *Reid v. Rigby & Co.*, [1894] 2 Q. B. 40, cited at p. 354, *supra*; and the other cases cited at pp. 353, 354,

supra.

(*p*) [1895] A. C. 173, at p. 184.

(*q*) (1857), 2 De G. & J. 21.

agency, but it seems to me that the principle is equally applicable in a case of that sort. I cannot understand the grounds on which it was argued that the two building societies, whose money went to pay off the charge of the London and South Western Bank, are not entitled to stand in the place of the bank as regards the title-deeds and the security created by the deposit of those deeds" (*r*).

Partnership.—Where the banker gives credit to a firm at the request of one partner, the question will arise whether the latter had authority to bind the former, or, if not, whether the other partners had so conducted themselves as to induce the banker to believe that he had.

A partner in a trading firm has implied authority to bind the firm by borrowing money for the purposes of its business (*s*).

But if money be lent to a partner who says he is borrowing it for the firm and he misapplies it, and there is proof that the banker was negligent and the transaction was out of the ordinary course of business, he cannot recover against the other partner or partners (*t*).

The unexplained fact that a partnership security has been received from one of the partners in discharge of a separate claim against himself is a badge of fraud, or of such palpable negligence as amounts to fraud, which it is incumbent on the party who so took the security to remove by showing either that the partner from whom he received it acted under the authority of the rest, or at least that he himself had reason to believe so.

Where the bankers of an individual member of a firm, knowing that the firm banked elsewhere, received from, and discounted for, their customer bills of exchange, purporting to be drawn and indorsed by the firm, and also indorsed by the customer, the signatures of the firm as drawers and indorsers and of the customer as indorsee, as well as the whole of the bills, with the exception of

(*r*) Cf. *Bank of Montreal v. Sweeney* (1887), 56 L. T. 897, cited at p. 807, *infra*; *Lloyds Bank v. Bullock*, [1896] 2 Ch. 192; *Rimmer v. Webster*, [1902] 2 Ch. 163.

(*s*) *Bank of Australasia v. Breillat* (1847), 6 Moo. P. C. 152, 194.

(*t*) *Lloyd v. Freshfield* (1826), 2 C. & P. 325; and *sub nom. Lloyd v. Freshfield*, 9 Dowl. & Ry. 19. But see this case discussed in *Okell v. Eaton* (1874), 31 L. T. 330; and Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 7.

the signatures of the acceptors, being in the customer's handwriting, it was held that the transaction showed on its face a conversion by the customer of partnership property to his own purposes; that the bankers had been guilty of great negligence in abstaining from inquiry, and that they could only claim as against the customer's co-partners so far as the customer himself might have claimed compensation from them in respect of moneys paid by him out of his private account for partnership purposes (*u*).

There is no implication of law from the mere existence of a trade partnership that one partner has authority to bind the firm by opening a banking account on its behalf in his own name.

In *Alliance Bank v. Kearsley* (*x*) the plaintiffs sought to recover the balance of a banking account alleged by them to be due from the defendant, William Kearsley. In 1864 the defendant and his brother, James Kearsley, carried on business in partnership at York and Manchester as coachbuilders, under the firm of George Kearsley & Co. James Kearsley managed the business at Manchester, and William, the defendant, that at York. In January, 1864, James Kearsley called on the plaintiffs' branch bank in Manchester, and stated that he wished to open an account for the coachbuilding business in Manchester, but that as he was the only resident partner in Manchester, and, as he alone would sign the cheques, the account had better be opened in his name. An account was accordingly opened; and when that account was closed, which was in September, 1869, it was overdrawn to the amount which was sought to be recovered. There was no evidence of any express authority from William Kearsley to James to open an account in his own name on behalf of the firm. Upon these facts the Judge ruled that a partner had no implied authority to bind his firm by a banking account opened in any other name than that of the firm, and that, consequently, the defendant was not liable. This ruling was upheld by the Court of Common Pleas.

"The question is," said Montague Smith, J., "whether, from the mere fact of the relationship of partners, it is to be implied that

(*u*) *Ex parte Darlington District, &c. Co., In re Riches* (1864), 4 De G. J. & S. 581.

(*x*) (1871), 6 C. P. 433; 40 L. J. C. P. 249; 24 L. T. 552; 19 W. R. 822.

an authority has been conferred on one of the partners to open a banking account on behalf of the partnership in his own name. It seems to me that, in the absence of any evidence of express authority, or of usage of this particular partnership or trade, it cannot be affirmed as a proposition of law that any such authority arises from the mere fact of partnership. The partner has authority to do what is usual in the ordinary course of the business. It is established that in trade partnerships one partner may borrow money for the partnership, and will bind his co-partner by so doing. That is held to be within the implied authority of a partner, because it has been found to be in the ordinary course of business necessary for the purposes of trade. But I do not think a judge can take upon himself to assume, without evidence, that it is within the ordinary course of business for one partner to open a banking account in his own name on behalf of the partnership so as to bind his co-partners to the state of that account whatever it may be. That being so, the foundation of the implied authority entirely fails. There was no evidence in the present case of express authority or ratification, and the whole case, therefore, resolves itself into the naked question whether, without evidence one way or the other, and simply on the knowledge which the Court has of the relationship of partners, and the light derived from decisions as to the extent of the authority of a partner, the Court can say that there is the implied authority contended for. The counsel for the plaintiffs have been unable to bring forward any case in which it has been decided that the opening of a banking account by a partner in his own name is within the scope of the ordinary authority conferred by partnership. It seems to me that it might be a dangerous proposition of law to lay down that there is such an authority. An account opened by a man in his own name is *prima facie* his private account, and it seems likely that such an implication of authority would give great facilities for mixing up private and partnership accounts so as to enable frauds to be committed with less chance of detection. Therefore I think that we ought not, without evidence, to assume as a proposition of law that such an implied authority exists. The onus of proof of authority lies on the party seeking to affect another by such authority. The plaintiffs here, as it seems to me, have failed to sustain this onus,

and, therefore, I am of opinion that the case was rightly withdrawn from the jury."

The mere fact that the firm has had the benefit of money borrowed by a partner will not render the firm liable to repay it (*y*). If money be lent to a partner on his individual credit, the fact that it is applied in discharge of the liabilities of the firm will not enable the lender to sue the firm for its repayment (*z*).

From the power of a partner in a trading firm to borrow, "it follows almost necessarily that he should have power to pledge partnership property as a security for advances" (*a*). He may, accordingly, pledge goods or chattels belonging to the firm (*b*). He cannot, however, effect a legal mortgage of real estate belonging to the firm, because he cannot bind his co-partners by deed (*c*).

A surviving partner can give a valid charge on property of the partnership, by way of security for a debt incurred by the partners during the life of the deceased partner (*d*).

Where a partner has pledged his separate property to secure future advances to be made by a banker to his firm, an advance made after his death will not be chargeable against the property pledged.

In *Bank of Scotland v. Christie* (*e*) a partnership composed of three persons, A., B. and C., gave a joint and several bond to a bank, to cover advances to be made to them by the bank on a cash credit; and, in that bond, two estates held by A. were specially named as part securities for these advances. A. died. It was held

(*y*) Cf. pp. 7—11, *supra*.

(*z*) *Lloyd v. Freshfield* (1826), 2 C. & P. 325; and *sub nom. Lloyd v. Freshfield*, 9 Dowl. & Ry. 19. See also *Smith v. Craven* (1831), 1 C. & J. 500; and *Ricketts v. Bennett* (1847), 4 C. B. 686, where it was held that one of several co-adventurers in a mine conducted on the cost-book principle, although intrusted with the general management, had not, as such, authority to pledge the credit of the general body for money borrowed for the purposes of the concern—such mines being customarily conducted on ready-money principles.

(*a*) Lindley on Partnership, 6th ed.

p. 152.

(*b*) *Ex parte Bonbonus* (1803), 8 Ves. 540; *Butchart v. Dresser* (1853), 10 Hare, 453; 4 De G. M. & G. 542; *Brownrigg v. Rae* (1850), 5 Ex. 489; *Gordon v. Ellis* (1844), 7 M. & G. 607; *In re Patent File Co., Ex parte Birmingham Banking Co.* (1870), 6 Ch. 83; *In re Clough, Bradford Commercial Banking Co. v. Cure* (1885), 31 Ch. D. 324.

(*c*) *Harrison v. Jackson* (1797), 7 T. R. 207; *Steiglitz v. Egginton* (1815), Holt, 141.

(*d*) *In re Clough, Bradford Commercial Banking Co. v. Cure*, see note (*b*), *supra*.

(*e*) (1840), 8 Cl. & F. 214.

that the partnership being dissolved by his death the security, so far as his estates were concerned, was no further continued—no arrangement between the surviving partners, or between them and the bank, for the purpose of settling the general accounts, being capable of affecting that security. After the death of A. the bank continued as before its dealings with the partnership, then constituted by B. and C.; and at a certain period, payments made to the bank entirely balanced the debt due to it at the time of A.'s death. It was held that the separate liability of A.'s estates was thereby discharged (*f*).

In *Ex parte McKenna, In re Laurence* (*g*) the firm of L. and M. had an account with the C. Bank, and M., one of the partners, had a separate account with the same bank. Upon the discounting by the bank of a promissory note of M., he deposited with them certain shares as security for the same or for any sum or sums of money in which he might then be, or might thereafter become, indebted to them. The shares afterwards became the property of the partnership firm. L. and M. became bankrupt, being indebted in a large amount to the bank. It was held that the bank was not entitled to hold the shares as a security for the joint debt, but for the separate debt only of M.

And where there is no partnership, but a joint liability is incurred by borrowers (as distinguished from a joint and several liability) upon the death of one, his estate will not be liable. Thus in *Other v. Iveson* (*h*) a bank had lent money to two brothers on condition that a third brother should join in giving security. The three brothers drew and signed a cheque, and the money was paid to them. The third brother died, and the other two being unable to pay, a bill was filed against the executors of the deceased brother. It was held that the liability was not joint and several, but joint only, and, therefore, that the survivors only were liable.

The powers of partners are dealt with above at pages 6 and 7 (*i*).

(*f*) Cf. pp. 13, 169, *supra*.

(*g*) (1861), 30 L. J. Bank. 20; 3 De G. F. & J. 629.

(*h*) (1855), 24 L. J. Ch. 654.

(*i*) *Brownrigg v. Rae* (1850), 5 Ex. 489,

and similar cases can no longer be relied upon as authorities, since the Judicature Act has removed the technical difficulties which were in the way of the plaintiff in such circumstances: see Lindley on Partnership, 6th ed. p. 279.

Position of Wife.—If a wife pledges goods belonging to her husband with a banker, the question will be whether she had authority from her husband to make the pledge (*k*).

Executorship.—An executor has the power to realize the personal estate and to pledge specific assets. But he cannot by borrowing money enable the lender to stand as a creditor upon the estate. A contract of borrowing made by him after the death of the testator is made personally. There is no loan to the estate or credit given thereto. The credit is given to the executor, although he may borrow the money for the purposes of the estate. He cannot be sued upon the contract as executor so as to get execution against the assets of the deceased (*l*).

In *Farhall v. Farhall* (*m*) the executrix of a testator kept an executorship account with a bank, and having a power under the will to mortgage the real estate in aid of the personalty, she deposited with the bank the title-deeds of part of the testator's real estate as security for the balance. The account was considerably overdrawn by the executrix and the moneys, to a great extent, misapplied, but without the bank having notice of the misapplication. The security having proved insufficient to pay the balance, the bank applied to prove as creditors against the testator's estate for the difference. It was held that they were not entitled to prove, for that a person cannot, by contract with an executor, acquire a right to prove as a creditor against the estate, though the executor has power to give him a lien on specific assets.

Of course, knowledge imputable to the banker of an intention on the part of the executor to misapply money advanced upon the security of a charge upon property belonging to the estate will exclude his right to insist upon the security.

In *Collinson v. Lister* (*n*) an executor borrowed money from a banking company of which he was the local agent, for the purpose of making a further advance to a mortgagor of a ship, on the

(*k*) *O'Connor v. Marjoribanks* (1842), 4 M. & G. 435. See also *Jolly v. Rees* (1864), 15 C. B. N. S. 628; *Debenham v. Mellon* (1880), 6 A. C. 24; *Morrell Brothers & Co. v. Westmorland (Earl of)*, [1904] A. C. 11.

(*l*) *Per James and Mellish, L.JJ.*, in *Farhall v. Farhall* (1871), 7 Ch. 123, at pp. 125, 126; 41 L. J. Ch. 146; 25 L. T. 685; 20 W. R. 157.

(*m*) See last note.

(*n*) (1855), 7 De G. M. & G. 634.

security of which the testatrix had lent money, on the pretence that such further advance was made to pay off a prior charge, but really to assist the mortgagor, and the security proved ultimately wholly insufficient. It was held that the company had no claim upon the testatrix's assets, and that a mortgage of the ship made by the executor to the company to secure their advance was invalid.

Lord Justice Knight-Bruce, in delivering judgment, said: "There have been instances, no doubt, in which a dishonest executor, by borrowing money in that character, has been able to make the lender effectually a creditor on the estate of the deceased. But if at the time of a loan to an executor, as executor, and before parting with the money, the lender has notice that the borrower in borrowing acts improperly, commits a breach of trust, and intends to misapply the money, the lender acquires no better title against the estate than the executor himself has, and must stand or fall with him. This rests, not only on the plainest principles of justice, but on the direct authority of Lord Eldon, nor on his great authority alone. And if a banking company has what is called a branch bank, managed or superintended by a local agent, who in that character advances money of the banking company by way of loan, knowing at the time facts which render the loan an improper transaction, and would prevent the agent from sustaining it were the transaction and the money his own—as in the instance of a trustee borrowing money in that character, who, by the very act of so borrowing, commits a breach of trust, having sought and obtained the money for the sole purpose of misapplying it, and the circumstances being all known at the time to the agent lending—I apprehend it to be clear that the banking company acquire no better title than the agent would have done had the case been his own, or than the trustee" (*o*).

The pendency of an administration action does not in itself abrogate the powers of the executor to give a valid security to a banker lending in good faith.

In *Berry v. Gibbons* (*p*) a decree was made in a creditors' suit

(*o*) See further upon this subject,
pp. 149—163, *supra*.

(*p*) (1873), 8 Ch. 747; 29 L. T. 88;
21 W. R. 754.

for the administration of the personal estate of a testator, but no receiver was appointed, nor any injunction granted to restrain the executrix from dealing with the assets. More than two years after the decree, and nearly three years after the death of the testator, his executrix, who was also his sole legatee, opened an account with a bank, headed: "Emily Gibbons, executrix of the late Benjamin Gibbons." In the following year, the account being overdrawn, she deposited with the bank a picture belonging to the testator's estate to secure the balance then due and further advances. It appeared that the bankers did not know of the suit, and had no notice of any breach of duty on the part of the executrix. It was held that the bank had a valid security on the picture.

CORPORATIONS.

Where the banker relies upon the credit of a corporation, the following questions arise:—(a) Had the corporation capacity to bind itself by contracting to repay the loan? (b) Had the individuals upon whose request the banker lent, power, under the constitution of the corporation, to bind it by borrowing, or were they, in fact, acting at the time as, and reasonably believed by the banker to be, directors, or officers duly qualified and appointed, and who, if so qualified and appointed, would have had power under its constitution to bind the corporation by borrowing? or, if not, have the acts of the persons who borrowed been effectually ratified?

General Principles.

A corporation created by charter can bind itself by its common seal to repay a loan, even though no power of borrowing is contained in its charter (*q*).

A corporation formed by special Act of Parliament, or under the provisions of a general Act, can bind itself to repay a loan if it has either an express or implied power to borrow. It will have an implied power, if it is formed to carry on an undertaking requiring the expenditure of money and no means are expressly provided for supplying it with funds for the purpose, but not

(*q*) *Riche v. Ashbury Railway Carriage Co.* (1874), L. R. 9 Ex. 224, 262; 7 E. & I. A. 653; *Wenlock (Baroness) v. River Dee Co.* (1887), 36 Ch. D. 674, 685, n.; 10 A. C. 354.

otherwise (r). In order to ascertain its powers, reference must be made to the statute, the memorandum of association, the rules or other governing provisions of the corporation, as the case may be (s).

Local Authorities.

County, urban and rural district councils, being created under Acts of Parliament, have only such powers as are expressly or impliedly conferred by those Acts.

In *Attorney-General v. London County Council* (t) Cozens-Hardy, J., said (u): "The county council is a body created by statute, and to every such statutory creation the language used by Lord Blackburn in the House of Lords with reference to a railway company in *Attorney-General v. Great Eastern Rail. Co.* (x) applies: 'Where there is an Act of Parliament creating a corporation for a particular purpose, and giving it powers for that particular purpose, what it does not expressly or impliedly authorize is to be taken to be prohibited.' . . . This principle was applied to the School Board for London in *Reg. v. Reed* (y), and I think it must be applicable to the London County Council. . . . It was also urged that the Court ought to give a more liberal construction to the powers conferred upon a public body for the public benefit than it is in the habit of giving to similar powers claimed by companies trading for gain. I am not satisfied that this distinction is well founded. In each case a reasonable construction ought to be put upon the language of the document conferring the powers, whether it is a statute, or a charter, or a memorandum of association."

Accordingly, the power of borrowing possessed by such a council is limited by the provisions contained in the Acts by which it is governed.

(r) *Wenlock (Baroness) v. River Dee Co.* (1887), 36 Ch. D. 675, n., 677, n., 682, n.; per Lord Selborne in *Blackburn Benefit Building Society v. Cunliffe, Brooks & Co.* (1882), 22 Ch. D. 61, at p. 70; and in *Oakbank Oil Co. v. Crum* (1882), 8 A. C. 65, at p. 71.

(s) See *Attorney-General v. London County Council*, [1901] 1 Ch. 781; [1902] A. C. 165; *Brooks & Co. v. Blackburn*

Benefit Society (1884), 9 A. C. 857. As to corporations generally, see the Forged Transfers Acts, 1891 and 1892 (54 & 55 Vict. c. 43; 55 & 56 Vict. c. 36).

(t) [1901] 1 Ch. 781; affirmed, [1902] A. C. 165.

(u) At p. 788 of [1901] 1 Ch.

(x) (1880), 5 A. C. 473, 481.

(y) (1880), 5 Q. B. D. 483.

Municipal corporations, being created by Royal Charter, stand on a somewhat different footing, as corporations at common law.

In *Attorney-General v. London County Council* (a) Lord Justice Rigby, after referring to the doctrine that in the case of a statutory corporation you must find within the four corners of the Act of Parliament by which the corporation has been created something to justify the assumption of the power which it claims to exercise, and that if there be nothing in the Act to justify the assumption of such power the power does not exist, said: "It is argued—and no doubt it is to a considerable extent true—that that doctrine does not apply to a corporation not created by Act of Parliament, that is, a corporation created by Royal Charter; and that inasmuch as a municipal corporation is not within that doctrine, the council of a municipal corporation is able to do in the name and on behalf of the corporation many acts which are not included in any statute, and which are within the general powers of a common law corporation. Granted that is the case, how does sect. 2 of the Local Government Act, 1888, make a county council capable of exercising the same powers as the council of a municipal corporation?"

In this connection the following provisions of the Public Health Act, 1875 (38 & 39 Vict. c. 55), are important.

By sect. 210 an urban sanitary authority may make a general district rate, which may be made either prospectively in order to raise money for the payment of future charges and expenses, or retrospectively in order to raise money for the payment of charges and expenses incurred at any time within six months before the making of the rate. By sect. 218, the urban sanitary authority, before making a general district rate under the Act, is to cause an estimate to be prepared of the money required for the purposes in respect of which the rate is to be made, which estimate is to be entered in the rate-book and to be open to public inspection; but the estimate is not to be deemed part of the rate, nor in any way to affect its validity.

In *Smith v. Southampton Corporation* (b) Channell, J., said: "I should like to point out what is the real meaning of the objection that a rate is retrospective, which I think this rate clearly was. It

(a) At p. 797 of [1901] 1 Ch.

(b) [1902] 2 K. B. 244, at p. 253.

means that any ratepayer is entitled to say that he is being charged with a sum which ought to have been charged upon and paid by the ratepayers in previous years. The principle is that these bodies are only entitled to charge upon future ratepayers present expenditure so far as they have statutory borrowing powers; the effect of their borrowing powers is to enable them to charge instalments of present expenditure upon future ratepayers, and borrowing powers are granted upon the understanding that the capital expenditure benefits the future ratepayers. Subject, therefore, to their borrowing powers, corporations and bodies of this character have no right to charge future ratepayers with present expenditure, and that is a principle which, as is well known, has for a long time been applicable to poor-rates; under the majority of rating statutes, too, the same kind of principle is applicable, but the extent of what is permissible depends upon the construction of the language of the particular statute. In this statute there is a clause permitting retrospective payments or retrospective rating (I draw no distinction between the two at present) within a limit of six months, and the question is what that means. Of course, the clause is intended to prevent the obvious inconvenience that would arise if these bodies were bound to pay cash down in respect of every item of expenditure incurred; practically that cannot be done, and there must be a limit of time, which the statute has fixed at six months. The argument of the corporation seems to come to this: that the effect of the six-months' clause is that the local authority may always have a floating debt arising from past expenditure, provided that that floating debt does not exceed six months' income; because, if it does not exceed six months' income, they can always, by an adjustment of accounts and by borrowing the money from their bankers, say that the debt has been incurred within the last six months. If their floating debt exceeded that amount, it is obvious that no adjustment of accounts could possibly have that effect. But I think that this is not a matter of adjustment of accounts at all: it is a matter of substance; and, looking at the resolutions that were passed, it is clear that the appellants had in fact been exceeding their borrowing powers and had incurred this sort of floating debt. Looking at the judgment of the recorder, which is made part of the case, it appears that they have secured

the services of an accountant who has drawn their attention to it, and that they have been making an effort to clear off this floating debt by charging so much to each year until they get the matter straight. However laudable such a course may be, the way in which it has been done is clearly to charge upon the present rate-payers expenditure which really was incurred in past times for more than six months before this rate was made, and which was not covered by their borrowing powers. Nothing that I am saying, and nothing that my Lord has said, is to be taken as in any way suggesting that there would be anything wrong in the course which must practically always be taken, that is, in raising temporary loans within the limits of the borrowing powers in respect of matters which require to be paid quickly, the local authority intending at some future date to raise one large loan by an issue of stock, and having necessarily to incur some small expenditure before the loan is raised; obviously a temporary loan from the bankers for such a purpose would stand upon a very different footing from what has been done here. Without dealing with the question of the form of the estimate or any similar question, it is quite clear that as a matter of substance this rate was in fact raised to a certain extent for the purpose of paying past expenditure incurred for more than six months before" (c).

(c) For detailed information as to the borrowing powers of various authorities, reference should be made to the statutes by which they are respectively constituted and regulated; and as to local authorities generally, see the Forged Transfers Acts, 1891 and 1892 (54 & 55 Vict. c. 43; 55 & 56 Vict. c. 36).—As a general rule, powers of borrowing conferred by public Acts upon county and district councils and other local authorities can only be exercised with the sanction of the Local Government Board, and loans purporting to be raised under such powers but to which the Board's sanction has not been obtained are not binding. This is the case under the Public Health Acts, the Local Government Acts, 1888 to 1894, the Municipal Corporations Act, 1882, the Poor Law

Acts, the Electric Lighting Acts, the Education Act, 1902, and many other statutes. Under some Acts, however, another Government department is the sanctioning authority; *e.g.*, the Board of Trade under the Tramways Act, 1870, and the Treasury under the Burial Acts. In a few cases local authorities are empowered to borrow under general Acts without any such sanction: see, *e.g.*, sect. 235 of the Public Health Act, 1875. Moreover, the local Acts obtained by such bodies as town councils, urban district councils, joint boards, and the London County Council do not make the sanction of a Government department necessary to the exercise of the borrowing powers which they confer; and more money is, in fact, borrowed under these Acts than under general Acts.

Trading Companies.

A company incorporated under the Companies Acts can bind itself to repay a loan and give security, if these are, upon the true construction of the memorandum of association, comprised within its objects.

A trading company will have these powers unless they are expressly excluded (*d*). It will be legally competent to borrow money to an extent which is reasonable and necessary for the purposes of its business (*e*).

In the case of a company registered since the year 1900, and to the shares of which the public have been invited to subscribe, a restriction is placed upon its powers of borrowing by the Companies Act, 1900 (63 & 64 Vict. c. 48).

6.—(1.) A company shall not commence any business or exercise any borrowing powers unless—

- (a) Shares held subject to the payment of the whole amount thereof in cash have been allotted to an amount not less in the whole than the minimum subscription; and
- (b) Every director of the company has paid to the company on each of the shares taken or contracted to be taken by him, and for which he is liable to pay in cash, a proportion equal to the proportion payable on application and allotment on the shares offered for public subscription; and
- (c) There has been filed with the registrar a statutory declaration by the secretary or one of the directors, in the prescribed form, that the aforesaid conditions have been complied with.

(2.) The registrar shall, on the filing of this statutory declaration, certify that the company is entitled to commence business, and that certificate shall be conclusive evidence that the company is so entitled.

(3.) Any contract made by a company before the date at which it is entitled to commence business shall be provisional only, and shall not be binding on the company until that date, and on that date it shall become binding.

(*d*) *General Auction Co. v. Smith*, [1891] 3 Ch. 432; *In re Patent File Co., Ex parte Birmingham Banking Co.* (1870), 6 Ch. 83.

(*e*) *In re Hamilton's Windsor Ironworks, Ex parte Pitman and Edwards* (1879), 12 Ch. D. 707; and cases cited below.

(4.) Nothing in this section shall prevent the simultaneous offer for subscription of any shares and debentures or the receipt of any application.

(5.) If any company commences business or exercises borrowing powers in contravention of this section, every person who is responsible for the contravention shall, without prejudice to any other liability, be liable to a fine not exceeding fifty pounds for every day during which the contravention continues.

(6.) Nothing in this section shall apply to a company registered before the commencement of this Act.

(7.) This section shall not apply to any company where there is no invitation to the public to subscribe for its shares (e).

Security for Debt.—"As to giving security for money borrowed, a company, as a body corporate, can, in furtherance of its objects, deal with its property as freely as an individual can, subject to any regulations contained in its articles, and can therefore, in the absence of a prohibition, express or implied, effect mortgages of its property. This power extends to a mortgage by deposit, and to the giving such a security as well for a past debt as for a future one" (f).

A power to mortgage "all or any part of the company's properties and rights" includes the power to mortgage the capital of the company for the time being uncalled (g).

In *In re Patent File Company, Ex parte Birmingham Banking Company* (h), the memorandum of association of a company, whose nominal capital was 100,000*l.*, stated its objects to be the manufacturing and selling of files and steel, and the doing all such other things (including the acquiring and "disposing of" lands and buildings) as were incidental or conducive to the attainment of those objects. The articles of association provided that the company might, with the sanction of an extraordinary general meeting, borrow, on mortgage of its property, any sums not exceeding one-half of its nominal capital; and provided that the directors might exercise all such powers of the company as were not, by the Companies Act, 1862, or by the articles, required to be

(e) As to the registration of mortgages and charges created by a company, see sect. 14 of this Act, and *Cornbrook Brewery Co. v. Law Debenture Corporation*, [1904] 1 Ch. 103.

(f) Buckley on Companies Acts, 8th ed. p. 184, and authorities there referred to.

(g) *Howard v. Patent Ivory Manufacturing Co.* (1888), 38 Ch. D. 155.

(h) (1870), 6 Ch. 83.

exercised by the company in general meeting. The company passed a resolution authorizing a mortgage to the extent of one-third of the nominal capital. A few weeks after this the account of the company with their bankers being overdrawn to the extent of more than 23,000*l.*, and the bankers pressing for security, the directors deposited with them the title deeds of the property on which the company carried on their business, and gave a memorandum of deposit under the seal of the company, making the deeds a security for the balance of account up to 25,000*l.* Within six months after this a resolution was passed for winding-up. It was held that this security was valid. The Court expressed the opinion that, in the absence of any prohibition in the articles, a company may secure a past debt by deposit of title deeds.

In *English Channel Steamship Co. v. Rolt* (i) among the objects of a company was the purchase of ships; and the directors were empowered to do all needful acts in furtherance of the objects of the company; they were also expressly authorized to borrow, on the security of the property of the company, any sum of money not exceeding two-thirds of the capital of the company not called up. The directors mortgaged a ship, the only property of the company, to secure the payment of a sum of money advanced to the company and of unpaid purchase-money of the ship; the amount so secured much exceeding two-thirds of the amount not called up of the shares actually issued, but being within two-thirds of the whole nominal capital not called up. It was held that the mortgage was within the powers of the directors, and was valid; and that the term "capital not called up" included shares which had not been issued.

A charge over the property and undertaking of a company to secure debenture-holders, or mortgagees in an equivalent position, leaves the company free to dispose of its property by sale or mortgage in the ordinary course of its business. Accordingly, even though the charge may be expressed to be a first charge on the undertaking, lands and effects of the company, it does not prevent the company from creating a valid mortgage of a specific asset as a

(i) (1881), 17 Ch. D. 715.

security for an advance of money which may take priority over the charge of the undertaking (*k*).

As to the registration of mortgages and charges reference should be made to the Companies Act, 1900 (*l*).

Borrowing Ultra Vires.—A contract made by the directors of a company incorporated under the Companies Acts by registration of a memorandum of association upon a matter not included in the memorandum is *ultra vires* of the directors, and is not binding on the company. Nor can such a contract be rendered binding on the company though afterwards expressly assented to at a general meeting of shareholders. Being in its inception void, as beyond the provisions of the Companies Act, 1862, it cannot be ratified even by the assent of the whole body of shareholders (*m*).

It is the same with regard to all companies created by any statute for a particular purpose (*n*).

In *Baroness Wenlock v. River Dee Company* (*o*) the respondents were constituted a company by an Act of Geo. 2, for the purpose of recovering and preserving the navigation of the River Dee. This Act was amended by subsequent Acts, but none of them expressly authorized or forbade the company to borrow till the Act 14 & 15 Vict. c. lxxxvii., which, by sect. 24, empowered the company to borrow at interest, for the purposes of their Acts, upon bond or mortgage of the lands recovered and inclosed by them, or partly upon bond and partly upon such mortgage, a sum not exceeding 25,000*l.*, and also a further sum, not exceeding 25,000*l.*, upon mortgage of their tolls, rates and duties. It was held that, whether the earlier Acts gave an implied power to borrow or not, the company were prohibited by the 14 & 15 Vict. c. lxxxvii. from borrowing except in accordance with the provisions of that Act.

"Where a society or a company," said Lord Justice Brett in *Chapleo v. Brunswick Building Society* (*p*), "has upon the face of its

(*k*) *In re Hamilton's Windsor Ironworks, Ex parte Pitman and Edwards* (1879), 12 Ch. D. 707; *Wheatley v. Silkstone Co.* (1885), 29 Ch. D. 715. Cf. *Murray v. Scott* (1884), 9 A. C. 519. See also pp. 726—728, *infra*.

(*l*) 63 & 64 Vict. c. 48, ss. 14—18.—See *In re Anglo-Oriental, &c. Co.*, [1903]

1 Ch. 914; *In re Yorkshire Woolcombers' Association, Ltd.*, [1903] 2 Ch. 284.

(*m*) *Ashbury Railway Carriage and Iron Co. v. Riche* (1875), 7 E. & I. A. 653.

(*n*) *Wenlock (Baroness) v. River Dee Co.* (1885), 10 A. C. 354.

(*o*) See last note.

(*p*) (1881), 6 Q. B. D. 696, at p. 715.

constitution, that is, either by the statute or statutory rules under which it is constituted, only a limited authority to borrow, then it seems to me that a person dealing with such a society or company must either inquire or run the risk. Here this society, by reason of the Friendly Societies Act and also by reason of its own rules, gave to its directors only a limited power to borrow. That limit was exceeded. The plaintiffs did not inquire; and though, probably, if they had inquired, they would have learned nothing, yet that is their misfortune, and they are debarred from recovering against this society."

But where the borrowing is not *ultra vires* of the company, although irregularly effected, the company may be bound.

Irregularity of Transaction.—In *Royal British Bank v. Turquand* (q) the plaintiffs sued the defendants, a joint stock company registered under 7 & 8 Vict. c. 110, on a bond, signed by two directors, under the seal of the company, whereby the company acknowledged themselves to be bound to the plaintiffs in 2,000*l*. The plea set out the condition, which appeared to be for securing to the plaintiffs such sum as the company should, to the amount of 1,000*l*., owe to the plaintiffs on the balance of the account current, from time to time, and for indemnifying the plaintiffs to that amount from losses incurred by reason of the account between them and the defendants. The plea further set out clauses of the registered deed of settlement, by which it appeared that the directors were authorized, under certain circumstances, to give bills, notes, bonds, or mortgages—one clause providing that the directors might borrow on bond such sums as should, from time to time, by a general resolution of the company, be authorized to be borrowed. The plea averred that there had been no such resolution authorizing the making of the bond, and that it was given without the authority of the shareholders. The replication set out the deed of settlement further, by which it appeared that the company was formed for the purpose of carrying on mining operations and forming a railway. On demurrers to the plea and replication, it was held, by the Court of Exchequer Chamber, affirming the judgment of the Court of Queen's Bench, that the plain-

(q) (1856), 6 E. & B. 327.

tiffs were entitled to judgment, the obligees having, on the facts alleged, a right to presume that there had been a resolution at a general meeting authorizing the borrowing the money on bond.

Jervis, C. J., delivering judgment in the Exchequer Chamber, said: "We may now take for granted that the dealings with these companies are not like dealings with other partnerships, and that the parties dealing with them are bound to read the statute and the deed of settlement. But they are not bound to do more. And the party here, on reading the deed of settlement, would find, not a prohibition from borrowing, but a permission to do so on certain conditions. Finding that the authority might be made complete by a resolution, he would have a right to infer the fact of a resolution authorizing that which on the face of the document appeared to be legitimately done" (r). The Chief Justice also expressed the opinion that a resolution of the company would confer sufficient authority on the directors if it authorized the borrowing on bond of such sums as the directors might deem expedient, in accordance with the statute and deed, without otherwise defining the amount.

So, where the directors had power under the articles of association of a company to fix the number of directors which should form a quorum, and by resolution they fixed three as a quorum, and afterwards at a meeting at which two only were present they authorized the secretary to affix the company's seal to a mortgage, which was accordingly done by the secretary in the presence of the same two directors, it was held that, as between the company and the mortgagees, who had no notice of the irregularity, the execution of the deed was valid (s).

So, in *In re General Provident Assurance Co., Ex parte National Bank* (t), it was held that the company could effect a mortgage by deposit of deeds without complying with the formalities required by their articles of association upon the execution of mortgage deeds, and that the bankers were not in the position of officers of

(r) See also *Mahony v. East Holyford Mining Co.*, cited at p. 272, *supra*; Companies Act, 1862 (25 & 26 Vict. c. 89), s. 67.

(s) *County of Gloucester Bank v. Rudry Merthyr Steam, &c. Co.*, [1895] 1 Ch.

629. See also *Owen and Ashworth's Claim*, [1900] 2 Ch. 272; [1901] 1 Ch. 115; *Mahony v. East Holyford Mining Co.* (1875), 7 E. & I. A. 869, cited at p. 272, *supra*.

(t) (1872), 14 Eq. 507.

the company, who were bound to see that the required formalities were complied with (*u*).

Under 7 & 8 Vict. c. 110, s. 45, the acceptance of a bill of exchange, drawn upon a joint stock company regulated by that Act, although signed by two of the directors, was void as against the company, if not "expressed" to be by such directors "on behalf of such company," though the clause did not contain any words of nullification. But, where a bill, drawn upon the company by their corporate name, and sealed with their seal, having the name of the company circumscribed, was accepted by two persons styling themselves directors of the company appointed to accept that bill, and the acceptance was countersigned by the company's secretary, it was held that such acceptance was sufficiently express (*x*).

Powers of Directors.—If the borrowing is within the powers of the company, and those who effect the loan are or are reasonably believed by the banker to be directors who have express or implied authority to do so, the company will be bound.

The directors of ordinary trading companies, in the absence of express provision upon the subject, have an implied power to borrow for the purposes of the business (*y*).

A power of borrowing is pre-eminently necessary in the case of a banking company, and will be very readily implied (*z*).

In the *Bank of Australasia v. Breillat* (*a*) directors of a bank were expressly endowed with "full power and authority to superintend, order, conduct, regulate and manage all and singular the affairs and business of the said company, to the best of their discretion and judgment," and to "devise and make such provisions, rules, orders and regulations touching the government, carrying on and management of the affairs of the said company, the same not being repugnant to the general rules and regulations" of the com-

(*u*) Upon another point decided in this case, it is not an authority: see note (*x*) on p. 713, *infra*.

(*x*) *Halford v. Cameron's Coalbrook, &c. Rail. Co.* (1851), 16 Q. B. 442.—As to when notice of the irregularity will be imputed to the lending company, see

In re Hampshire Land Co., [1896] 2 Ch. 743.

(*y*) *In re Hamilton's Windsor Ironworks, Ex parte Pitman and Edwards* (1879), 12 Ch. D. 707.

(*z*) See p. 47, *supra*.

(*a*) (1847), 6 Moo. P. C. 152, 194.

pany, "as they should think expedient." It was held that the directors had the powers of managing partners in an ordinary banking partnership, and, amongst these, the power of borrowing money for the purpose of discharging the existing liabilities of the bank till the assets should be realised, and of discontinuing the bank if they thought such conduct essential to the interests of the shareholders (*b*).

The powers of directors of banking companies have been dealt with above, at pages 44—47, to which reference may be made in this connection.

In *In re International Life Assurance Society, Gibbs and West's Case* (*c*), the deed of settlement of an insurance company contained no express power of borrowing, but empowered the directors to do and execute all acts, deeds, and things necessary, or deemed by them proper or expedient, for carrying on the concerns and business of the company, and to do, enforce, perform, and execute all acts and things in relation to the company, and to bind the company, as if the same were done by the express assent of the whole body of members thereof. It was held that the directors acted within their powers in borrowing money from the bankers of the company to meet pressing demands upon the company, and charging the proceeds of a call already made, but not immediately payable, with the repayment of the loan; and that two of the directors who had become sureties for the company, and had repaid the loan, were entitled to the benefit of the charge on the call.

Between the presentation of a petition to wind up an insurance company and the winding-up order, the directors, being in negotiation for the transfer of the company's business and liabilities to another company, and being pressed by the company's bankers for payment of their overdrawn account, passed a resolution giving the bankers a charge on the proceeds of calls made before the presentation of the petition, and gave their own promissory note for the amount of the debt, as sureties for the company. It was held that the charge on the calls, having, under the circumstances, been given with the *bonâ fide* intention of preventing the ruin of

(*b*) Cf. *MacLae v. Sutherland* (1854), 3 E. & B. 1.

(*c*) (1870), 10 Eq. 312.

the company, ought to be confirmed by the Court in the exercise of the discretion given to it by the Companies Act, 1862, s. 153; and that the directors, having paid the debt of the bankers, were entitled to a lien on the proceeds of the calls (*d*).

In *In re Land Credit Company of Ireland, Ex parte Overend, Gurney & Co. (e)*, the directors of a general trading company, part of whose business was to accept bills of exchange, and whose articles conferred the most extensive powers of management on the directors, passed a resolution authorizing the chairman to accept bills drawn on the company by L., upon L.'s depositing securities to a certain amount. The chairman accordingly accepted the bills, and L. deposited some securities, but not nearly to the specified amount. The directors by resolution affirmed the transaction, but it did not appear that they knew that the requisite amount of securities had not been deposited. The bills were entered in the books of the company, and treated as binding on them. On the company being wound up, a *bonâ fide* holder of some of the bills claimed to prove. It was held that the proof ought to be admitted, for that the bills were binding on the company, as they had been accepted *modo et formâ* by the authority of the board of directors, and the provision as to the deposit of securities was a collateral matter, into the observance of which a holder of the bills was not bound to inquire.

Ratification.—If the borrowing be not *ultra vires* of the company, but only of the directors' powers under the articles of association, it may be ratified by the company and so become binding thereon.

In *Irvine v. Union Bank of Australia (f)*, by article 50 of the articles of association of the O. R. Company (which was limited by guarantee, and registered in Victoria under a local Act corresponding with the English Companies Act, 1862), it was provided that the directors' power of borrowing sums on the credit of the company "should not exceed in the aggregate as an existing debt at the same time one-half of the then actually paid-up capital." The articles contained no restriction upon the company's power of borrowing; and the directors' power to borrow was capable of

(*d*) *In re International, &c. Society, Gibbs and West's Case*, see last note. Upon another point the decision in this case was dissented from in *In re West of*

England and South Wales District Bank, Ex parte Braswhite (1879), 48 L. J. Ch. 463.

(*e*) (1869), 4 Ch. 460.

(*f*) (1877), 2 A. C. 366.

being extended, under article 31, by one-half of the votes of all the shareholders given at a general meeting. On the 23rd of December, 1867, the directors obtained a letter of credit, No. 150, for 10,000*l.*, and on the 11th of September, 1868, a letter, No. 141, for 5,000*l.*, and made a statement to that effect in their report of the 29th of October, 1868, which was ratified at the half-yearly meeting of that date. Letter No. 150 expired on the 29th of March, 1869, but was renewed. On the 9th of September, 1869, the directors obtained another letter of credit, No. 153, for 5,000*l.*, but this act was never assented to or ratified by the shareholders. In a suit by the respondent bank to enforce against the appellant, as the assignee of the right, title, and interest of the O. R. Company, an equitable mortgage which had been granted by the company to secure advances made by the bank which, with interest, amounted to 15,296*l.*, it appeared that half of the actually paid-up capital was never more than 8,550*l.*; that, at the end of 1870, the balance due to the bank was 8*l.*; and that the sums claimed in this suit had been advanced in February, 1871, viz., 10,000*l.* under letter No. 150, and 5,000*l.* under letter No. 153. It was held that the limitation of the power of borrowing and mortgaging contained in article 50 was merely a limitation of the authority of the directors conferred by the same article; that it was not a limitation of the general powers of the company, and that the acts of the directors in excess of their authority might be ratified by the company and rendered binding; but that the ratification of the report of the 29th of October, 1868, did not authorize the directors to obtain the letter of credit No. 153, in September, 1869, or to borrow 5,000*l.* thereon in February, 1871; and the ratification of the letter of credit No. 150, for 10,000*l.*, did not authorize the renewal of it, or the acting upon it after the time originally limited had expired. It was further held that, although it might be competent for a majority of shareholders present (though not a majority of the shareholders of the company) at an extraordinary meeting convened for that object, and of which object due notice had been given, to ratify an act previously done by the directors in excess of their authority; yet if the object was to give the directors in future an extended authority beyond what was given by article 50, that could only be effected by a vote of one-half of all the shareholders of the company; and that the ratification at a half-yearly

meeting of a particular act of the directors, in excess of authority, would not extend the authority of the directors, so as to authorize them to do similar acts in future (g).

Subrogation.

Where a company in borrowing has acted *ultra vires*, the banker may still be able to recover from the company the whole or part of the advance by virtue of a right of subrogation.

A lender of money to a company, which acts *ultra vires* in the matter, is entitled to be placed in the position of creditors of the company who have been paid out of such money, and so to recover from the company the amount of their debts or liabilities so paid off. This right is commonly referred to as the equitable right of subrogation.

Where the banker allows the officers of a company or benefit society, which has no power to borrow money, or which has exhausted any such power, to overdraw its account, the banker will be a creditor of the company or society in respect of the overdraft only to the extent to which he can prove that the moneys advanced by him were actually applied in payment of the legal debts and liabilities of the company or society which were properly payable, and which have not in fact been repaid to him.

In *Brooks & Co. v. Blackburn and District Benefit Building Society* (h) the society, which had no power to borrow money, was allowed by its bankers to make large overdrafts. In 1876 a memorandum was signed by the officers of the society, and confirmed by the directors, stating that certain deeds of borrowing members, which had been deposited with the bankers, were deposited, not only for safe custody, but as a security for the balance from time to time. In 1881 an order for winding-up the society was made, and the bankers claimed to retain the deeds as security for the balance of their account. No evidence was given as to the

(g) See also *MacLae v. Sutherland* (1854), 3 E. & B. 1; *Crellin v. Calvert* (1845), 14 M. & W. 11 (in which case shareholders were held to have acquiesced in the establishment by directors of a branch bank); *Grant v. United Kingdom Switchback Co.* (1888), 40 Ch. D. 135.—

A company cannot ratify a contract purporting to have been made on its behalf before it came into existence: *Kelner v. Baxter* (1866), 2 C. P. 174; *Natal Land, &c. Co. v. Pauline Colliery Syndicate*, [1904] A. C. 120.

(h) (1884), 9 A. C. 857.

application of the money which was drawn out by the society ; but it was admitted that some part was applied in payment of members withdrawing from the society, and the remainder in payment of salaries, legal expenses, and expenses of mortgaged property.

It was held by the Court of Appeal that the overdrafts were *ultra vires*, being a borrowing not authorized by the rules, and not properly incident to the course and conduct of the society's business for its proper purposes ; and that the bankers were not creditors of the society in respect of the overdrafts ; but that they were entitled to hold the deeds as a security for the repayment of so much only of the moneys advanced by them as was applied in payment of the debts and liabilities of the society properly payable, and had not been repaid to the bankers, excluding payments to withdrawing members ; that the burden of proving this lay on the bankers, and that in satisfying that burden they could not have the benefit of the rule in *Clayton's Case* (i). The Court made an order accordingly, directing inquiries, with a declaration that, in making the inquiries, the bankers were to be charged with all sums received by them on account of the society since it ceased to have any balance to its credit with the bankers, and that they were not to be allowed any sums advanced by them since that date which were applied in making payments to withdrawing members, or otherwise than in paying such debts and liabilities of the society as aforesaid. In the House of Lords, whither the case was carried by the bankers, it became unnecessary to pronounce any judgment upon the question of payments to withdrawing members, or the bankers' right to hold the securities (as to which, therefore, the case stands with the authority of a decision of the Court of Appeal). Upon the other points in the case the decision of the Court of Appeal was upheld.

The right to subrogation is not confined to the amount of debts and liabilities existing at the time of the advance, and so paid off, but extends to debts and liabilities accruing subsequently to and paid out of such advance (k).

The banker is not subrogated to any securities or priorities of the creditors who are paid by means of his money (l).

(i) (1816), 1 Mer. 572. See pp. 167—169, *supra*. Co. (1887), 19 Q. B. D. 155.

(l) *In re Wrexham, Mold and Connah's*

(k) *Wenlock (Baroness) v. River Dee Quay Rail. Co.*, [1899] 1 Ch. 440.

Warranty of Authority.

A person professing to contract as the agent of another, or of a company, but in reality without authority, although in the belief that he has such authority, is liable to the other party upon an implied warranty of authority (*m*), or if the supposed principal is not in existence upon the contract itself (*n*).

The banker may accordingly have a right against an individual professing to act as the duly authorized agent of another person, or as the officer of a company, to recover the amount of a loan with which the supposed principal or company cannot be charged.

In *Cherry and M'Dougall v. Colonial Bank of Australasia* (*o*) two of the directors of a joint stock company, by a letter to the company's bankers, notified that their manager had authority to draw cheques on account of the company. Such two directors did not form a majority of the directors of the company, as required by their Act of Incorporation, so as to bind the company. Although the company's account was at the time overdrawn, and that fact was known to the two directors, the bankers honoured the manager's cheques on the authority so given to them. In an action brought by the bank against the two directors for advances made on account of the company upon the faith of their letter, it was held that there was an implied warranty on their part, and that they were personally liable to the bank, and judgment was given to the extent of the sums overdrawn by the manager subsequent to the date of their letter.

In *Firbank's Executors v. Humphreys* (*p*) the plaintiff contracted to make a railway, and did work for which he was entitled to be paid cash. The company not being in a position to pay, an agreement was made during the progress of the works by which the plaintiff agreed to accept debenture stock in lieu of cash. The defendants, who were directors of the company, thereupon issued to the plaintiff certificates for the agreed amount of debenture stock, such certificates being signed by two of the defendants. At that time, although the fact was not known to the defendants, all

(*m*) See the cases cited, *infra*, on this 174.
and the two following pages.

(*o*) (1869), L. R. 3 P. C. 24.

(*n*) *Kelner v. Baxter* (1866), 2 C. P.

(*p*) (1886), 18 Q. B. D. 54.

the debenture stock which the company were entitled to issue had been issued, and consequently that which the plaintiff received was an over issue, and valueless. The company subsequently went into liquidation, but the valid debenture stock retained its par value. In an action to make the defendants personally liable for the amount of the debenture stock which should have been issued to the plaintiff under the agreement, it was held that the defendants were liable on their implied representations that they had authority to issue valid debenture stock which would be a good security, and that, under the circumstances, the damages were the nominal amount of the stock which the plaintiff ought to have received under his agreement (q).

The principle of the foregoing authorities is not confined to cases where the transaction with the person representing himself to be an agent results in a contract. It extends to cases where a person professing to have authority as agent induces another to act in a matter of business on the faith of his having that authority.

This was decided in *Starkey v. Bank of England* (r). There S., a stockbroker, produced to the Bank of England a power of attorney for the sale and transfer of Consols standing in the names of the plaintiff and another person, a solicitor, the form of power having been obtained in ordinary course from the Bank by S. upon the instructions of the solicitor, who professed to act on behalf of the plaintiff as well as himself; but the plaintiff knew nothing of the matter. The power purported to be signed by both stockholders, and at the foot was the usual "demand to act," signed by S. Acting on that "demand," and in pursuance of their statutory duty, the Bank allowed S. to execute the transfer in the Bank books as "attorney" for the two stockholders. S. received the purchase-money under the power and paid it to the solicitor, who applied it to his own use. Subsequently it was discovered that the plaintiff's signature to the power had been forged, whereupon, in an action by the plaintiff against the Bank, the latter were ordered

(q) See also *Richardson v. Williamson* (1871), L. R. 6 Q. B. 276; *Weeks v. Probert* (1873), 8 C. P. 427; *McCollin v. Gilpin* (1881), 6 Q. B. D. 516; *West London Commercial Bank v. Kitson* (1884), 13

Q. B. D. 360; *Halbot v. Lens*, [1901] 1 Ch. 344.

(r) [1903] A. C. 114; reported in the Court of Appeal *sub nom. Oliver v. Bank of England*, [1902] 1 Ch. 610.

to transfer to him the like sum of Consols, and also to pay to him all back dividends, together with the costs of the action. The Bank then claimed indemnity as against S. under a third-party notice. No blame was attributable either to S. or to the Bank for what had happened. It was held that a warranty was to be implied as against S. of the authority upon which he "demanded" of the Bank the performance of their statutory duty, and that this implied warranty rendered him liable to indemnify the Bank (s).

A fortiori if a director has certified that the debenture stock transferred as collateral security is within the statutory limit, and the Bank has advanced money on the faith of this, the director will be personally liable (t).

But a mere statement as to how cheques are to be drawn upon the balance of a company, or the drawing of cheques after the balance is exhausted, will not amount to a warranty of authority.

In *Beattie v. Lord Ebury* (u) directors of a company had sent a letter to their bankers, at a time when the company had a balance in the hands of the bankers, in the following terms:—

"To the Directors of the Union Bank of London, or their
Manager at the Temple Bar Branch.

GENTLEMEN,

Watford and Rickmansworth Railway.

Please to honour the cheques of this company signed by two
of the directors, and countersigned by the secretary.

(Signed) { JOSEPH CARY.
REG. CAPEL.
J. WARWICK."

It was held that this direction did not of itself impose on the directors giving it any personal responsibility as to the cheques, though the bankers continued to act upon it after the company's account had been overdrawn. It was further held that no liability was incurred by those who, at a subsequent meeting of the board of directors, confirmed the minutes of the board meeting at which it was given, and also drew cheques in accordance with it, though

(s) Cf. *Sheffield Corporation v. Barclay*, [1903] 2 K. B. 580, cited in Sect. 5 of this Part; and see also *Cross v. Fisher*, [1892] 1 Q. B. 467; and cf. *Elkington*

& *Co. v. Hürter*, [1892] 2 Ch. 452.

(t) *Whitehaven Joint Stock Banking Co. v. Reed* (1886), 54 L. T. 360.

(u) (1874), 7 E. & I. A. 102.

the account was overdrawn when these latter cheques were issued and honoured (x).

“So far as this authority is concerned,” said Lord Cairns, L. C., “of course it would only be a matter affecting the three directors who signed it, Cary, Capel, and Warwick. But what does the authority amount to? At that time, there is no dispute, that the account of the railway company with the bankers had not been overdrawn. In point of fact the bankers had a balance in their hands belonging to the company. It appears to me that the letter is nothing more than a simple intimation of a most business-like kind transmitted to the bankers of the company, as to the manner in which they were to expect cheques emanating from the company to be signed—an intimation to them that unless the cheques were signed in this way, they were not to treat them as the properly authorized cheques of the company, and were not to honour them. There is, in this document, no undertaking whatever on the part of any director of the company that he will be answerable for the debts of the company, or that if these cheques are not paid by the company he himself will pay them. In point of fact, the account of the company with the bank at that time not being overdrawn, this authority, as I read it, is nothing more than a statement as to how cheques were to be drawn upon that balance which was in existence at the bank. So far as this authority is concerned, it was not in any way a direction to the bank to honour cheques after the whole of that balance had been withdrawn. But then, my Lords, the appellants at your Lordships’ Bar go on from that and say, even supposing that this is not an authority during all time to honour cheques, whether there was a balance or not at the bankers, still after the whole of the balance was exhausted, cheques did in fact continue to be drawn upon the bank and to be honoured by the bank, and for those cheques the directors are personally liable, because, it is said, every cheque so drawn (that is, drawn after the balance was exhausted) must be taken to have been a representation of some kind (it is difficult to say what) by the directors to the bank, by virtue of which they become personally liable. My Lords, if cheques are from time to time drawn on a bank on behalf of a

(x) *Richardson v. Williamson*, see note (q) on p. 636, *supra*, was distinguished.

railway company, the bankers are perfectly aware whether they have got in their hands a balance of the company, or whether they have not. If they have in their hands a balance of the company, it is their duty to honour the cheques, provided only they are drawn in the manner that has been specified. If on the other hand, they have not a balance in their hands belonging to the railway company, it is for them to consider whether they will run the risk of allowing the account to be overdrawn, and whether if they do so, the law will allow them to recover as upon a loan, or as upon an advance of money, against the railway company. Those are matters which it is for the bankers and for them alone, to consider, and I can see nothing in the fact that cheques are drawn and signed by directors of a railway company, upon a bank, which knows its own affairs, and knows the state of the balances of its customers, that should in any way make those directors of the railway company personally liable" (y).

In the same case, the bankers having made advances to the railway company, made a demand on the directors of the company to deliver to them as "security" for the advances "unissued shares" of the company, and "such preference shares and debentures as you may obtain authority to raise in next session of Parliament." This demand was not construed to mean that the shares and debentures should be paid-up shares and debentures, and it was held that the directors by delivering unissued shares and debentures (on which money had not been paid), were not guilty of any misrepresentation and did not render themselves liable to make good to the bankers those shares and debentures. The bankers having demanded and received unissued preference shares as "collateral security" for advances they had made on the company's cheques and having been registered on the register of the company as the holders of such shares, it was held that the Court ought to examine into the circumstances of the transaction and could direct the proper steps to be taken to cancel such registration; and the House of Lords directed the officers of the railway company to take all proper measures for cancelling the registration.

(y) The law is different as to directors of building societies by virtue of the Building Societies Act, 1874 (37 & 38

Vict. c. 42), s. 43: *Cross v. Fisher*, [1892] 1 Q. B. 467.

CHAPTER IV.

REPRESENTATIONS AS TO CREDIT.

If the banker in making an advance relies upon a representation by a third party as to the credit of the borrower, he should see that it is in writing and signed personally by the party making it. Otherwise, although it be false and fraudulent, the banker will have no remedy against the person who has made it.

This results from Lord Tenterden's Act (9 Geo. 4, c. 14), sect. 6 of which is as follows:—

No action shall be brought whereby to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade or dealings of any other person, to the intent or purpose that such other person may obtain credit, money, or goods upon (*a*), unless such representation or assurance be made in writing, signed by the party to be charged therewith.

The signature of an agent will not bind his principal (*b*); nor will that of a branch manager of a banking co-partnership bind the latter (*c*). The signature of a partner, although in the name of, and by the express authority of his firm, will bind himself only (*d*). A company registered under the Companies Acts cannot be held liable for such a representation (*e*).

A representation made by a partner as to the credit of his firm is within the section (*f*).

So is a representation by A. that money may be safely lent to B.

(*a*) This word is evidently a mistake, "thereupon" probably being intended; see *Lyde v. Barnard* (1836), 1 M. & W. 101, at p. 115.

(*b*) *Swift v. Jewsbury* (1874), L. R. 9 Q. B. 301.

(*c*) *Ibid.*

(*d*) *Williams v. Mason* (1873), 28 L. T.

N. S. 232.

(*e*) *Hirst v. West Riding Union Banking Co. and Hartley* (1901), Bankers' Insurance Managers' and Agents' Magazine, Vol. 72, p. 259.

(*f*) *Devaux v. Steinkeller* (1839), 6 Bing. N. C. 84.

because the title deeds to a certain estate which A. asserts that B. has bought are in A.'s possession, and nothing can be done without A.'s knowledge, and that the party to whom the representation is made will be perfectly safe in making such loan to B. (g).

A representation that particular property on the security of which a person is contemplating lending money is sufficient—for example, a representation by a trustee that a life interest in property subject to the trust is subject to certain charges only—is probably within the section (h).

Sect. 6 of the Mercantile Law (Scotland) Amendment Act, 1856, is in substance the same as the above-cited section; the words “shall have no effect” being substituted for “no action shall be maintainable.”

In *Clydesdale Bank and Another v. Paton* (i) the respondents alleged that the appellant bank's agent, knowing that D. R. & Co., customers of the appellants, were largely indebted to the appellants' bank and were insolvent, conceived a fraudulent design of obtaining the respondents' acceptances in favour of D. R. & Co., in order to apply them *pro tanto* in reducing D. R. & Co.'s debt to the appellants' bank; that, in pursuance of this fraudulent scheme, D. R. & Co. applied to the respondents for accommodation, and referred them to the appellants' agent, who falsely assured the respondents (1) that D. R. & Co. were in a thoroughly sound condition financially, and only required temporary accommodation; (2) that the sum due to the appellants' bank was very trifling; and (3) that D. R. & Co. had made up the losses which they had sustained through another company; that in reliance on these assurances the respondents granted acceptances to D. R. & Co., which were applied to the credit of D. R. & Co.'s banking account with the appellants. D. R. & Co. were sequestrated, and the respondents as the bills fell due were compelled to pay them. All the representations relied on were made orally. It was held that there was no cause of action, because the allegations came within the Act, the terms of which extend to any oral representation made with the intent specified in the section, however false and fraudulent (k).

(g) *Swann v. Phillips* (1838), 8 Ad. & W. 101.
E. 457.

(i) [1896] A. C. 381.

(h) See *Lyde v. Barnard* (1836), 1 M.

(k) Even if the representation had

If a representation as to the credit of a third person has been made in writing duly signed, and has substantially and mainly induced the party to whom it has been made to lend money to that person, and it appears that the representation was false and fraudulent, an action can be maintained by the lender, although he has been in part influenced by subsequent oral representations (*l*).

An action may be maintained by a customer upon a false and fraudulent representation made in writing to his bankers in answer to an inquiry made by them at his request and acted upon by him to his loss (*m*).

In this connection it may be convenient to add that a representation by the drawer that bills of exchange drawn upon L. will assuredly be paid, because the drawer has previously remitted to L. funds to a much larger amount, in consequence of which representation B. purchases those bills from the drawer, does not amount to an equitable assignment by the drawer of the funds in the hands of L., nor to a specific appropriation out of those funds of the amount of each of those bills (*n*).

The subject of this chapter is treated in other relations at pp. 61—62 and 584—585, to which reference should be made.

been in writing, no action upon it could have been maintained against the bank itself, as distinguished from the agent by whom it was signed: see p. 584, *supra*.

(*l*) *Tatton v. Wade* (1856), 18 C. B. 371; 25 L. J. C. P. 240.

(*m*) *Swift v. Jewsbury* (1874), L. R. 9 Q. B. 301.—See also upon this subject *Haslock v. Fergusson* (1837), 7 A. & E. 86; *Turnley v. Macgregor* (1843), 6 M. & G.

46; *Pearson v. Seligman* (1883), 48 L. T. 842; 31 W. R. 730; *Jolliffe v. Baker* (1883), 11 Q. B. D. 255; 52 L. J. Q. B. 609.

(*n*) *Citizens' Bank of Louisiana v. First National Bank of New Orleans* (1873), 6 E. & I. A. 352, where the question arose in the drawer's bankruptcy. This case followed *Thomson v. Simpson* (1870), 5 Ch. 659, where the facts were practically the same. Cf. *Lovett v. Lovett*, [1898] 1 Ch. 82, at p. 88.

CHAPTER V.

GUARANTEES:

FORMATION OF THE CONTRACT.

A BANKER proposing to make, or continue, an advance to a customer in reliance upon a guarantee given by another should see—(1) that the material facts of the case are brought to the knowledge of the latter; (2) that the contract of guarantee is embodied in a memorandum signed by the guarantor (*a*) or his duly authorized agent; and (3) that the terms of the contract are such as clearly cover the transactions contemplated.

These matters will be first considered. Subsequently the rights arising out of the contract of guarantee and the ways in which the surety may be discharged will be dealt with.

Disclosure of Material Facts.

The banker should take care that the surety is informed of every circumstance of the transaction of a kind which would not necessarily be contemplated by the surety, and of every term of the arrangement between the banker and the customer affecting the degree of the surety's responsibility (*b*). If he omits to do this the contract of suretyship may be avoided.

The law as to the duty of disclosure on the part of the creditor was laid down by Blackburn, J., in *Lee v. Jones* (*c*), as follows: "When the creditor describes to the proposed sureties the trans-

(*a*) This word and "surety" may be considered convertible terms. *Ex parte Sharp* (1844), 3 M. D. & D. 490, at p. 504.

(*b*) See per Abbott, C. J., in *Pidcock v. Bishop* (1825), 3 B. & C. 605. Cf. (*c*) (1864), 17 C. B. N. S. 482, at p. 503.

action proposed to be guaranteed (as in general a creditor does), that description amounts to a representation, or at least is evidence of a representation, that there is nothing in the transaction that might not naturally be expected to take place between the parties to a transaction such as that described. And, if a representation to this effect is made to the intended surety by one who knows that there is something not naturally to be expected to take place between the parties to the transaction, and that this is unknown to the person to whom he makes the representation, and that, if it were known to him, he would not enter into the contract of suretyship, I think it is evidence of a fraudulent representation on his part. . . . I think that it must in every case depend upon the nature of the transaction, whether the fact not disclosed is such that it is impliedly represented not to exist; and that must generally be a question of fact proper for a jury."

The position of the banker in this connection was considered in *Hamilton v. Watson* (*d*), where it was held in the House of Lords that a guarantee by a third party of a cash credit to be given to one of the banker's customers was not avoided by the fact that, immediately after the execution of the obligation, the cash credit was employed to pay off an old debt due to the banker.

Lord Campbell in his speech in this case said: "Your Lordships must particularly notice what the nature of the contract is. It is suretyship upon a cash account. Now the question is, what, upon entering into such a contract, ought to be disclosed? and I will venture to say, if your Lordships were to adopt the principles laid down, and contended for by the appellant's counsel here, that you would entirely knock up those transactions in Scotland of giving security upon a cash account, because no bankers would rest satisfied that they had a security for the advance they made, if, as it is contended, it is essentially necessary that everything should be disclosed by the creditor that is material for the surety to know. If such was the rule, it would be indispensably necessary for the bankers to whom the security is to be given to state how the account has been kept: whether the debtor was in the habit of overdrawing; whether he was punctual in his dealings; whether

he performed his promises in an honourable manner;—for all these things are extremely material for the surety to know. But unless questions be particularly put by the surety to gain this information, I hold that it is quite unnecessary for the creditor, to whom the suretyship is to be given, to make any such disclosure; and I should think that this might be considered as the criterion whether the disclosure ought to be made voluntarily; namely, whether there is anything that might not naturally be expected to take place between the parties who are concerned in the transaction, that is, whether there be a contract between the debtor and the creditor, to the effect that his position shall be different from that which the surety might naturally expect; and, if so, the surety is to see whether that is disclosed to him. But if there be nothing which might not naturally take place between these parties, then, if the surety would guard against particular perils, he must put the question, and he must gain the information which he requires. Now, in this case, assuming that there had been the contract contended for, and that that had been concealed, that would have vitiated the suretyship. There is no proof, nor is there any allegation, that there was any such contract. There is, therefore, neither allegation nor proof, and what then does the case rest upon? It rests merely upon this, that at most there was a concealment by the bankers of the former debt, and of their expectation, that if this new suretyship was given, it was probable that that debt would be paid off. It rests merely upon non-disclosure or concealment of a probable expectation. And if you were to say that such a concealment would vitiate the suretyship given on that account, your Lordships would utterly destroy that most beneficial mode of dealing with accounts in Scotland” (e).

This case was followed in *Welton v. Somes* (f), where it was held that a banker is not bound, on taking a guarantee, to disclose the fact that his customer has given him an estimate of the deficiency

(e) This speech was cited with approval by Pollock, C. B., delivering the judgment of the Court in *North British Insurance Co. v. Lloyd* (1854), 10 Exch. 523, at p. 534, but was unfavourably referred to by Shee, J., in *Lee v. Jones*

(1864), 17 C. B. N. S. 482, at pp. 500-1. Cf. *Wythes v. Labouchere* (1858), 3 De G. & J. 593; *Davies v. London and Provincial Marine Insurance Co.* (1878), 8 Ch. D. 469.

(f) (1889), 5 T. L. R. 184.

which he contemplates in his account for the period to be guaranteed.

The two last-mentioned cases may be usefully compared with *Stone v. Compton* (g). There bankers had advanced 2,000*l.* to C. upon the security of an indenture of mortgage executed by C. and a promissory note for 2,000*l.*, in which the defendant joined as a surety. At the time of the advance C. owed the bankers 800*l.*, which was deducted from the 2,000*l.*, but the recital of the mortgage deed, which was read by the bankers' agent in the presence of the defendant, stated untruly that the 800*l.* had been paid. It was held that the defendant was not liable on the promissory note (h).

In *Owen v. Homan* (i) Lord Chancellor Cranworth laid down the rule as to the obligation of the creditor in cases of suspicion as follows: "Without saying that in every case a creditor is bound to inquire under what circumstances his debtor has obtained the concurrence of a surety, it may safely be stated that, if the dealings are such as fairly to lead a reasonable man to believe that fraud must have been used in order to obtain such concurrence, he is bound to make inquiry, and cannot shelter himself under the plea that he was not called on to ask, and did not ask, any questions on the subject. In some cases wilful ignorance is not to be distinguished in its equitable consequences from knowledge. If a person abstains from inquiry because he sees that the result of inquiry will probably be to show that a transaction in which he is engaging is tainted with fraud, his want of knowledge of the fraud will afford no excuse. Now, here, not only were the circumstances such . . . as made the inquiry natural, but they were such as made abstaining from the inquiry unnatural."

In this connection reference may be made to what is said as to the duty of disclosure under the head of "Guarantees for Fidelity," at pages 73—74.

The Written Memorandum.

A contract of guarantee should be in writing, signed by the guarantor or his agent.

(g) (1838), 5 Bing. N. C. 142.

at p. 655, *infra*.

(h) Cf. *Williams v. Rawlinson*, cited

(i) (1853), 4 H. L. C. 997, at p. 1034.

It is provided by the Statute of Frauds (*k*) that no action shall be brought upon a "special promise to answer for the debt, default or miscarriage of another person," unless the promise is evidenced in writing. Accordingly, no action can be maintained by a banker against a surety unless the contract of guarantee is evidenced by some written memorandum or note.

It is not necessary that the memorandum should have been made at the time of the contract; it is sufficient if it is in existence at the time when the action upon the guarantee is commenced (*l*). It may consist of two or more documents provided they are consistent and complete, and their connection appears upon the face of them (*m*). It must be signed by the guarantor or his duly authorized agent, who need not, however, have been himself appointed in writing (*n*). The signature need not be in ink or even in writing; it is sufficient if it is in pencil (*o*), or takes the form of a mark (*p*), or of initials (*q*), or of a surname only (*r*), or is printed (*s*), or impressed with a stamp (*t*). It may occur at the beginning (*u*), or, indeed, in any part of the document, provided it be inserted in such a way as to authenticate the whole (*x*). It is not necessary that the memorandum should be addressed to the banker (*y*). A letter signed by the guarantor and written to his

(*k*) 29 Car. 2, c. 3, s. 4.

(*l*) Per Erle, J., in *Sievwright v. Archibald* (1851), 17 Q. B. 103, at p. 107; per Parke, B., in *Roberts v. Tucker* (1849), 3 Ex. 633, at p. 641; *Bailey v. Sweeting* (1861), 9 C. B. N. S. 843; *Lucas v. Dixon* (1889), 22 Q. B. D. 357.

(*m*) *Allen v. Bennet* (1810), 3 Taunt. 169; *Jackson v. Lowe* (1822), 1 Bing. 9; *Long v. Millar* (1879), 4 C. P. D. 450.

(*n*) Statute of Frauds, s. 4. See *Emmerson v. Heelis* (1809), 2 Taunt. 38, at p. 46; *Durrell v. Evans* (1862), 1 H. & C. 174; *Reuss v. Picksley* (1836), L. R. 1 Ex. 342; *Murphy v. Boese* (1875), L. R. 10 Ex. 126.

(*o*) *Geary v. Physic* (1826), 5 B. & C. 234.

(*p*) *Dyas v. Stafford* (1882), 9 L. R. Ir. 520, at p. 524.

(*q*) See *Chichester v. Cobb* (1866), 14 L. T. 433; *Sweet v. Lee* (1841), 3 Man.

& G. 452, 460; *Hubert v. Moreau* (1826), 2 C. & P. 528; 12 Mo. 216.

(*r*) *Lobb v. Stanley* (1844), 5 Q. B. 574.

(*s*) *Schneider v. Norris* (1814), 2 M. & S. 286. Cf. *Hucklesby v. Hook*, W. N. (1900) 45.

(*t*) See *Bennett v. Brumfitt* (1867), 3 C. P. 28; *Reg. v. Cowper* (1890), 24 Q. B. D. 533.

(*u*) *Ogilvie v. Foljambe* (1817), 3 Mer. 53; *Lobb v. Stanley* (1844), 5 Q. B. 574; *Godwin v. Francis* (1870), 5 C. P. 295.

(*x*) Per Lord Abinger, C. B., in *Johnson v. Dodgson* (1837), 2 M. & W. 653, at p. 659; per Lord Chelmsford, L. C., in *Caton v. Caton* (1867), 2 H. L. 127, at p. 139; per Lord Westbury, *ibid.*, at p. 142. See also *Stewart v. Edowes* (1874), 9 C. P. 311.

(*y*) *Barkworth v. Young* (1856), 4 Drew. 1; 26 L. J. Ch. 153 (approved in

own agent, and referring to letters of the agent stating the terms upon which the latter has made a contract of guarantee on his behalf with the banker, will be sufficient (*z*).

The memorandum must show who are the parties to the contract, that is to say, the particular banker and guarantor (*a*); but it is sufficient if, although not named, they are described or referred to so as to render it easy to identify them with certainty (*b*). It must also show all the material terms of the contract (*c*), except the consideration (*d*). If the guarantee upon its face appears incapable of performance on either side within a year, apparently even the consideration must appear in the memorandum (*e*).

Although the consideration need not, except in the case mentioned, appear in writing, it must exist in fact, unless the guarantee is under seal (*f*). From the nature of the case, the consideration is usually the advance of money by the banker to his customer, the principal debtor, and not a direct personal advantage accruing to the guarantor. It may also consist of a forbearance on the part of the banker from suing the debtor at the request of the guarantor (*g*).

As an illustration of a promise amounting in law to a guarantee, and therefore unenforceable because its terms were not evidenced in writing, reference may be made to *Jenkins and Sons v. Coomber* (*h*). There it was agreed between the plaintiffs and A., who owed them money, that they should draw a bill on him, and that the defendant, who was A.'s father, should indorse it to guarantee payment.

In re Holland, Gregg v. Holland, [1902] 2 Ch. 360; *Jones v. Victoria Graving Dock* (1877), 2 Q. B. D. 314; *In re Hoyle*, [1893] 1 Ch. 84.

(*z*) *Gibson v. Holland* (1865), 1 C. P. 1.

(*a*) *Williams v. Lake* (1859), 2 E. & E. 349; 29 L. J. Q. B. 1.

(*b*) *Hood v. Barrington* (1868), 6 Eq. 218; *Commins v. Scott* (1875), 20 Eq. 11; *Catling v. King* (1877), 5 Ch. D. 660.

(*c*) *Wain v. Warters* (1804), 5 East, 10; *Lees v. Whitcomb* (1828), 5 Bing. 34; *Sykes v. Dixon* (1839), 9 A. & E. 693; *Holmes v. Mitchell* (1859), 7 C. B. N. S. 361; 28 L. J. C. P. 301.

(*d*) Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), s. 3.

(*e*) See *Morrell v. Cowan* (1877), 7 Ch. D. 151; 47 L. J. Ch. 73.

(*f*) See *Barrell v. Trussell* (1811), 4 Taunt. 117; *Coles v. Pack* (1869), 5 C. P. 65, where the view was expressed that *Scemple v. Pink* (1847), 1 Ex. 74, has been overruled by *Oldershaw v. King* (1857), 2 H. & N. 517; 27 L. J. Ex. 120.

(*g*) *Crears v. Hunter* (1887), 19 Q. B. D. 341; *Miles v. New Zealand Alford Estate Co.* (1886), 32 Ch. D. 266.—A forbearance to enforce payment of a loan will be sufficient consideration to support an agreement by the customer to give security: *Alliance Bank v. Broom* (1864), 2 Drew. & S. 239; *Fullerton v. Provincial Bank of Ireland*, [1903] A. C. 309. (*h*) [1898] 2 Q. B. 168.

They accordingly drew a bill on A. to their own order, and, without indorsing it, gave it to A., who returned it to them accepted by himself, and indorsed by the defendant. They then indorsed it. It was not paid at maturity. In an action against the defendant, it was held that he was not liable as indorser under sect. 55 of the Bills of Exchange Act, 1882, nor as having incurred the liabilities of an indorser under sect. 56, since at the time he put his name on the bill it was not complete and regular on the face of it, as it lacked the plaintiff's indorsement; and it was further held that he was not liable on a contract of suretyship, since the provisions of the Statute of Frauds were not satisfied (*i*).

On the other hand, it is to be observed that a promise which at first sight appears to be a guarantee, or, in the words of the Statute of Frauds, a "special promise to answer for the debt, default or miscarriage of another," may nevertheless be distinguishable, and accordingly enforceable by action, although not evidenced by any written instrument. For example, a promise of indemnity, or a promise to answer for a debt or liability due by the promisee himself, is not within the statute.

Thus, in *Guild & Co. v. Conrad* (*j*), the defendant orally promised the plaintiff that if he, the plaintiff, would accept certain bills for a firm in which the defendant's son was a partner, he, the defendant, would provide the plaintiff with funds to meet the bills. It was held that this was a promise of indemnity, and not of guarantee, and therefore not required by the Statute of Frauds to be in writing (*k*).

Bond.—Where a banker takes a bond from a customer and a surety, conditioned for the payment of all sums already advanced, or thereafter to be advanced, to the customer, there is no merger, and the customer may be sued for the balance of his account as upon a debt by simple contract (*l*).

Stamp Duty.—A guarantee must be stamped; if not under seal, with a 6*d.* agreement stamp, and, if under seal, with an *ad valorem* stamp as a bond (*m*).

(*i*) See also *Harburg India Rubber Comb Co. v. Martin*, [1902] 1 K. B. 778. Leake on Contracts, 4th ed. pp. 159—161.

(*j*) [1894] 2 Q. B. 885.

(*k*) As to this subject, see further

(*l*) *Holmes v. Bell* (1841), 3 M. & G. 213.

(*m*) The Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 14 (4), Schedule, "Bond";

In *Cholmeley v. Darley* (*n*) A., B. and C. made a joint and several promissory note for 100*l.*, payable to the plaintiffs, trustees of a banking company, or their order, on demand. A memorandum, indorsed on the note at the same time, signed by A., B. and C., stated that the note was given to secure floating advances made by the company to A., from the respective times when such advances had been or might be made, together with commission, &c., not exceeding in the whole at any one time the sum of 100*l.* In an action by the payees of the note against C., to which he pleaded the Statute of Limitations, the plaintiffs proved payments by A., in reduction of the floating balance, within six years, and sought to use the memorandum indorsed on the note to show that such payments had reference to the note. It was held that it could not be read in evidence without an agreement stamp.

Inclusion of Co-Sureties.

In *Evans v. Bremridge* (*o*), where a surety joined in a covenant on the understanding that an intended co-surety, whom it purported to make a co-covenantor, would execute the deed containing the covenant, but he failed to do so, and the covenantees nevertheless advanced the money purported to be secured by the deed, it was held that the surety who had executed the deed was entitled to be relieved.

Where two or more persons join as sureties for a common principal, but bind themselves in different amounts, in the event of the principal being in default, they are liable to contribute to the satisfaction of the creditor's claim in proportion to the limits of their respective liabilities, and not in equal amounts.

In *Ellesmere Brewery Co. v. Cooper* (*p*) four persons, as sureties for a principal, executed a joint and several bond of suretyship, by the terms of which the liability of two of them was limited to 50*l.* each, and that of the others to 25*l.* each. One of those whose liability was limited to 50*l.*, after the other three had executed the bond, executed it himself, but added to his signature the words

Glover v. Halkett (1857), 2 H. & N. 487; Ex. 328.

26 L. J. Ex. 416; 5 W. R. 881.

(*o*) (1856), 8 De G. M. & G. 100.

(*n*) (1845), 14 M. & W. 344; 14 L. J.

(*p*) [1896] 1 Q. B. 75.

"25% only." The obligee accepted the bond so executed without objection, and subsequently the principal became in default. It was held that the effect of the addition was to make a material alteration in the bond, so that the three first signatories were thereby discharged from their obligation; and that, as the last signatory only executed the bond as a joint and several bond, he also was not bound by it.

But in *Cooper v. Evans* (q) a surety who had executed a bond on the faith of its being executed by the principal debtor also, was held not entitled to be released from his obligation on the ground that the principal had never executed it, the principal having executed an instrument on which the surety might sue him and become a specialty creditor of his.

SCOPE OF THE GUARANTEE.

In the construction of guarantees two questions not infrequently arise: (1) Is the contract of the surety intended as a security for a particular debt only, or is it intended as a continuing guarantee applicable to the state of the debtor's account with the banker from time to time? and (2) Is it for the whole or part of the debt; in other words, is it, although limited in amount as to the guarantor's liability, in respect of the whole debt, or applicable to that part only of the debt which is co-extensive with the amount of the guarantee?

A contract of guarantee will be construed in the light of the facts of the position as between the banker and his customer. But if it is intended by the banker that the guarantee should be a continuing guarantee covering the state of the customer's account from time to time, the words of the contract should make this clear.

When Limited to a Particular Debt.

Normally a guarantee will extend only to the debt contracted by the principal debtor at the time when the guarantee is entered into.

(q) (1867), 4 Eq. 45,

In *Walker v. Hardman* (r) Henry Lomas, Edward Getley and Thomas Fidgeon carried on business in partnership, and kept a banking account with Walkers & Co. William Fidgeon, who was a brother of Thomas Fidgeon, agreed to become surety to the bankers for the partnership. Accordingly the three partners and he executed a bond whereby they bound themselves jointly and severally in 20,000*l.* to Walkers & Co. The condition of the bond ran as follows:—

“If the above-bound Thomas Fidgeon, Edward Getley, Henry Lomas and William Fidgeon, or some or one of them, their or some or one of their heirs, executors or administrators, or any of them, shall and do well and truly pay, or cause to be paid, unto the above-named Thomas Walker, Samuel Walker, Jonathan Walker, Vincent Eyre and Richard Stanley, or any of them, their executors, administrators or assigns, the full sum of 10,000*l.* of lawful money of the United Kingdom of Great Britain and Ireland, current in England, upon demand, together with full lawful interest for the same, from the date hereof, of like lawful money, without any deduction or abatement whatsoever (except for the property tax, as required by law), and without fraud or further delay, then this obligation to be void and of none effect, or else to remain in full force and virtue.”

After this bond was given very large sums were paid in and paid out on account of the firm. The latter having become bankrupt, and William Fidgeon having died, it was sought to recover 10,000*l.* and interest against his estate.

“The question is,” said Lord Lyndhurst in the House of Lords, “whether this bond was for the purpose of securing a debt then due, or for the purpose of securing any future balances which might exist on the account between Lomas & Co. and Walkers, the bankers. On the face of the bond there is nothing to show that it was a security for future balances; on the contrary, the circumstance that interest was reserved from the date of the bond would lead to the conclusion that it was intended not to be for a future debt, but for a debt then existing, for then only would it carry interest. If it was intended as a security to cover future

(r) (1837), 4 Cl. & F. 258.

balances, it would be more or less inconsistent with probability that there should be a security variable in its amount, and yet carrying interest on the possible increase. So far, therefore, the inferences of probability carry us. But then it is said that this bond was deposited as a security for future balances, and that the Master, by his report, so found, and that from the nature of the transaction it must have been so, and that it would not be a benefit for the bankers to have a security for an existing debt, which might soon be wiped off, but that it would be of advantage to have a security for balances which might afterwards accrue between these parties, Lomas & Co. and themselves. I have not any doubt that, as between Lomas & Co. and the bankers, it might have been so intended. But then the question is, whether that can affect William Fidgeon, the surety? Lomas & Co. might so deposit the bond with the bankers as a security for future balances, but they are not, by that mode of dealing between themselves, to vary the liability of William Fidgeon, the surety in the bond, unless he gave them authority for that purpose. There is no evidence that he did give any such authority; there is nothing to show that Fidgeon thought the bond was a security for floating balances. The observation I have just made applies as against H. Lomas & Co., who are men of business, but that does not appear to be the case with Fidgeon, who was, indeed, so unacquainted with business that he thought he was only liable for one-fourth of the amount. The Master found that when the bond was re-executed Fidgeon asked what the debt then was. Upon that fact it is contended that he thought the bond was not for any debt then existing, but for floating balances. The answer to that argument is, that it is clear that he was not a man of business, and it was natural for him to ask whether the debt then existing was the same in amount as when the bond was first given. He might think that in the meantime it had been reduced by payments. From that question alone I do not think that any inference can be drawn affecting the rights of Fidgeon. There is, I repeat, nothing to show that he really imagined the bond to be for a floating balance. I am therefore of opinion that the judgment of the Court below should be affirmed, and that Fidgeon should be declared not

liable for more than the debt as it existed when the bond was first entered into."

In *In re Boys, Eedes v. Boys (s)*, a lady had joined as surety with her nephew in giving to the Hop Planters' Company a joint and several promissory note for 500*l.* payable eight months after date. The note was dated on the 31st March, 1866, and in the account of the nephew with the company he was debited with an advance of 200*l.* on that day and with 300*l.* on the 6th April following. The account was continued down to the 19th July, 1869. The items entered on the credit side subsequently to the 6th April, 1866, amounted to more than was sufficient to satisfy all that was due from the nephew to the company on that day, but on the whole a balance of 1,163*l.* 3*s.* 6*d.* was claimed as due to the company, which amount was partly secured by mortgages. The nephew having become bankrupt, it was unsuccessfully sought to recover the amount of the note against the estate of the aunt, who had died.

Lord Romilly, M. R., in giving judgment, said: "The real question is, whether the note was given as a security for money then due, or to be advanced by the company to the nephew, or whether it was intended to be a continuing security to meet the running balance from time to time that might be due on the account of the nephew. This really is a question of evidence. *Primâ facie*, the note would appear to be for the purpose of securing an advance to be made to the nephew from the company, or a balance then due from him, and, to establish the contrary, evidence is required; and I think that the burden of proof should lie upon those who seek to establish that it was intended to be a running security for the balance of the account from time to time. In my opinion, assuming the evidence to consist solely of the statement laid before me, and the accounts which are given, it seems to be in favour of the note being a security for the advance then made to him. In the first place, it is to be observed that the promissory note is not payable on demand. If it was given to secure the balance of a current account, you would expect it to be payable when the account was closed, or at the period when they

thought fit to say they would not advance any more money. But it is payable at eight months certain, which is like a bill. Then, in the second place (what I think is still more important), it appears that, on the very day of the note being given, there was an advance of 200*l.* made by the company to the nephew, which is followed six days afterwards by another advance of 300*l.*, making exactly the amount of 500*l.* There is nothing to explain this. They required the testatrix to become jointly and severally liable for the promissory note, and that is all; and, in my opinion, their object was that they should have her security for his repayment of the money which they advanced him. The cases cited do not appear to me to affect the question. The one which was most relied upon was the case of *Henniker v. Wigg* (*t*), and there were several others, such as *Williams v. Rawlinson* (*u*). But in my opinion they all amount to this: that there must be evidence of some sort or other to show that a security purporting to be for a definite sum was given to meet the balance of a current account. In *Henniker v. Wigg* it was assumed that in an ordinary case the security would be merely for the money advanced, but in that case the Court was of opinion, upon the inferences to be drawn from the language, and from the conduct of the parties after the execution of the bond, that it was intended that the bond should stand as a continuing security; and that being so, the rule in *Clayton's Case* (*x*) did not apply. In my opinion, the inferences here are exactly the other way, and therefore the claim fails" (*y*).

Continuing Guarantees.

The following cases indicate the kind of expressions or circumstances which will suffice to constitute a guarantee a continuing one.

In *Williams v. Rawlinson* (*z*) T. having a banking account with the plaintiffs, on which he was indebted to them to the amount of 10,000*l.*, the defendant executed a bond conditioned to secure the

(*t*) (1843), 4 Q. B. 792, cited at p. 657, *infra*.

(*u*) (1825), 3 Bing. 71, cited *infra*, on this page.

(*x*) (1816), 1 Mer. 572. See as to this Part II. Chap. 4.

(*y*) See also *In re Medewe's Trust* (1859), 26 Beav. 588.

(*z*) (1825), 3 Bing. 71.

plaintiffs for any sums which for ten years the plaintiffs should advance on bills, &c., which T. should from time to time draw on them or make payable at their house, and all cheques, &c., not exceeding 5,000*l.* in the whole. It was agreed that this bond should not affect a prior security given to the plaintiffs by T. five years before; but no notice was given to the defendant by the plaintiffs that T. was indebted to them in 10,000*l.* at the time the defendant executed his bond. T., however, saw the accounts every fortnight and received the vouchers half-yearly. At the close of his account T. was indebted to the plaintiffs in more than 10,000*l.*; but subsequently to the execution of the defendant's bond he had paid into the plaintiffs' bank more than 5,000*l.* It was held that the defendant was liable to the extent of 5,000*l.*

In *Laurie v. Scholefield* (a) R. & Co. being about to open an account with the Union Bank, the defendant and one Black signed the following guarantee: "In consideration of the Union Bank agreeing to advance and advancing to R. & Co. any sum or sums of money they may require during the next eighteen months, not exceeding in the whole 1,000*l.*, we hereby jointly and severally guarantee the payment of any such sum as may be owing to the bank at the expiration of the said period of eighteen months." 1,000*l.* was placed by the bank to the credit of R. & Co.'s drawing account, and R. & Co. were debited with 1,000*l.* in a loan account. R. & Co. from time to time drew cheques against, and paid money to the credit of, their drawing account. Over 1,000*l.* was thus paid in by R. & Co., and they were not debtors on the drawing account when it was finally closed. The loan account remained unaltered. The bank sued the defendant for 1,000*l.* on the guarantee, and, after the commencement of the action, Black paid the bank 500*l.* in discharge of his liability. The defendant did not plead this payment. It was held, that the guarantee was a continuing one, and that the defendant's liability was not discharged by the payments made by R. & Co.

In *Burgess v. Eve* (b) a father, being desirous of obtaining advances for his son from a bank, gave the son a promissory note for 2,000*l.*, and gave the bank an agreement under seal to this

(a) (1869), 4 C. P. 622.

(b) (1872), 13 Eq. 450.

effect, that, in consideration of the bank discounting the note for 2,000*l.* for his son, certain deeds and documents which the father deposited with the bank should remain with the bank as security for the payment of all money due or to become due from the son to the bank on any account whatsoever; and that he would pay the bank upon demand all such money, and he thereby charged the property comprised in such documents with the repayment thereof. It was held that this agreement was not limited to the 2,000*l.*, but was a continuing guarantee for all money already due, or which should become due from the son to the bank (*c*).

So where a surety has given a guarantee for a particular amount, the rule in *Clayton's Case* will not apply, and the amount of the guarantee will not be brought into the account, or considered to have been paid off by reason of items entered to the credit of the customer, if it appears from the mode of dealing between the banker and the customer, or from the conduct or language of the surety, that the guarantee was in fact intended, and treated by the surety and the banker as having been given, to secure the banker against advances which he might from time to time make to the customer (*d*).

Amount Guaranteed.

Where a surety gives a continuing guarantee limited in amount to secure the floating balance which may from time to time be due from the principal to the creditor, the guarantee is, as between the surety and the creditor, to be construed (*primâ facie* at least) as applicable to a part only of the debt co-extensive with the amount of the guarantee. But a guarantee limited in amount for a debt already ascertained which exceeds that limit is not *primâ facie* to be construed as a security for part of the debt only. It is a question of construction on which the Court is to say whether the intention was to guarantee the whole debt with a limitation on the liability of the surety, or to guarantee a part of the debt only.

(*c*) See also *Coles v. Pack* (1869), 5 C. P. 65; *Phillips v. Foxall* (1872), L. R. 7 Q. B. 666; *Sanderson v. Aston* (1873), L. R. 8 Ex. 73; *Wilson v. Craven* (1841), 8 M. & W. 584, and the cases cited on pp. 74—77, *supra*.

(*d*) *Henniker v. Wigg* (1843), 4 Q. B. 792. See also *Hartland v. Jukes* (1863), 1 H. & C. 667; 32 L. J. Ex. 162; 9 Jur. N. S. 180. See also pp. 670—676, *infra*, and cf. Chap. 7, Sect. 1, of this Part.

In *Ellis v. Emmanuel* (e) a debtor and his surety executed a joint and several bond for 14,000*l.*, conditioned for avoidance if they or either of them should, in satisfaction of a debt of 7,000*l.* then due from the debtor to the obligee, pay the 7,000*l.*, with a proviso that the surety should not be liable under the bond for a sum or sums exceeding altogether in debt or damages 1,300*l.* The debtor having paid 1,000*l.*, part of the debt, and then filed a petition for liquidation, the obligee proved for and received a dividend of 9*s.* 2*d.* in the pound on 6,000*l.* under the liquidation. After deducting from the 7,000*l.* the 1,000*l.* and the dividend, there remained more than 1,300*l.* due. The obligee having brought an action on the bond against the surety to recover 1,300*l.*, the surety contended that he was entitled to deduct from the 1,300*l.* a rateable proportion of the dividend, viz., 9*s.* 2*d.* in the pound on 1,300*l.*, and was only liable for the balance. It was held that the intention of the bond was that the surety should guarantee the whole 7,000*l.*, though his liability was limited to 1,300*l.*, and that he was, therefore, not entitled to deduct a rateable proportion of the dividend, but was liable for the whole 1,300*l.*

In *In re Sass, Ex parte National Provincial Bank of England* (f), a surety guaranteed a bank the payment of all sums of money which then were or might thereafter from time to time become due or owing to the bank from their customer S., but nevertheless the total amount recoverable from the surety was not to exceed 300*l.* The guarantee was to be a continuing security, and any dividends which the bank might receive on the bankruptcy of S. were not to prejudice their right to recover from the surety to the full extent of the guarantee any sums which after the receipt of such dividends might remain owing to them by S. S. became bankrupt, and the bank, after receiving the 300*l.* from the surety, claimed to prove in the bankruptcy for the full amount due to them from S. The trustee in bankruptcy contended that the proof ought to be reduced by the amount the bank had received from the surety. It was held that the bank were entitled to prove for their whole debt without any deduction.

“If,” said Vaughan Williams, J., “the surety is a surety for part

(e) (1876), 1 Ex. D. 157.

(f) [1896] 2 Q. B. 12.

of the debt, and the surety has paid that part, then by virtue of that payment the right of proof, which would have been the right of proof of the principal creditor, becomes *pro tanto* the right of proof by the surety. The surety has a right, having paid part of the debt in that way, to stand *pro tanto* in the shoes of the principal creditor; and even if the principal creditor has proved and has received the dividend, and the surety comes and repays the full amount, the principal creditor would then be trustee for the surety of the amount of the dividend which he had so received. In my judgment that right of the surety as against the principal creditor only arises in a case where the surety has paid the whole of the debt. It is quite true that where the surety is surety for a part of the debt as between the principal creditor and the debtor, the right of the surety arises merely by payment of the part, because that part, as between him and the principal creditor, is the whole. Now for the purpose of this guarantee all I have to determine here is, whether, as between the bank and the surety, the surety became a surety for the whole of the debt or for a part. In my judgment the surety here became a surety for the whole of the debt. It is true that his liability was to be limited; but still, notwithstanding that, his suretyship was in respect of the whole debt, and he, having paid only a part of that debt, has in my judgment no right of proof in preference or priority to the bank to whom he became guarantor."

In *Ex parte National Provincial Bank of England, In re Rees (g)*, a customer gave to his bankers, as security for the balance which might from time to time be due from him to them, the joint and several bond for 1,000*l.* of himself and a surety, the liability of the surety being expressly limited to 500*l.* There was a proviso in the bond that any dividends received by the bankers in the bankruptcy of the customer should not, so far as concerned the surety, go in discharge of his liability; but the bankers should, notwithstanding, be entitled to recover on the bond against the surety to the full extent of 500*l.*, or so much thereof as should, together with the dividends, amount to 20*s.* in the pound on the debt due by the customer to the bankers. The customer filed a liquidation

petition, and the bankers proved for the debt due to them. Afterwards the surety paid the bankers 500*l.*, and he then proved in the liquidation for 500*l.* It was held that the bankers were entitled to retain their proof for the full amount (*h*).

RIGHTS OF THE PARTIES.

Right of Banker against Surety.

In the absence of express provision to the contrary, the creditor's right of action against the surety arises as soon as the principal debtor has made default.

Accordingly, the banker need not first sue the principal debtor (*i*), or resort to securities which he holds from the latter (*k*), or request him (*l*) or the surety himself (*m*) to pay, or even give the latter notice of the debtor's default (*n*).

But the surety is not bound by a judgment or award against the debtor, nor is an admission by the debtor evidence against the surety; he is entitled, unless the contrary has been agreed, to have the debt proved in the action against himself (*o*).

The creditor is not entitled to the benefit of securities given by the principal debtor to the surety (*p*).

Bankruptcy of Surety.—The banker will have a right of proof upon the bankruptcy of the surety in respect of his right against the latter upon the guarantee (*q*).

Where proof is made against a bankrupt's estate on a guarantee entered into by the bankrupt on behalf of another, if, at the time

(*h*) In *Meek v. Wallis* (1872), 27 L. T. 650, the Court had to construe a limitation upon the amount for which the surety was liable under a continuing guarantee by bond. See also *In re Denton's Estate*, [1903] 2 Ch. 670.

(*i*) *Wright v. Simpson* (1802), 6 Ves. jun. 714, 733.

(*k*) *Wilks v. Heeley* (1832), 1 C. & M. 249.

(*l*) *Warrington v. Furber* (1807), 8 East, 242; *Walton v. Mascall* (1844), 13 M. & W. 452; *Black v. Ottoman Bank* (1862), 15 Moo. P. C. 472.

(*m*) *Hitchcock v. Humfrey* (1843), 5 M.

& G. 559.

(*n*) *Batson v. Spearman* (1838), 9 A. & E. 298. See, however, *Morten v. Marshall* (1863), 9 Jur. N. S. 651.

(*o*) *Ex parte Young, In re Kitchin* (1881), 17 Ch. D. 668.

(*p*) *In re Walker, Sheffield Banking Co. v. Clayton*, [1892] 1 Ch. 621. See, however, *M'Mahon v. Fetherstonhaugh*, [1895] 1 Ir. R. Ch. D. 182.

(*q*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 37. See *Commercial Bank of Australia v. Official Assignee of the Estate of Wilson & Co.*, [1893] A. C. 181, cited at p. 677, *infra*.

of proving, the creditor has received part of the debt, either by payment or as a dividend from the estate of the principal debtor, or even if such dividend has been declared though not actually paid, such creditor will be allowed to prove for the residue only after deducting the amount so paid or declared. But if, after proof is made, the creditor receives a dividend from the estate of the principal debtor, that will not be deducted from the amount of his proof (*r*).

A banker who has become the holder for full value of a promissory note, and the transferee of a guarantee of the amount of the note, can prove for the full amount in the bankruptcy of the indorser. Under such circumstances he is not a secured creditor in respect of the contract of guarantee, and need not deduct its value (*s*).

But in order that a banker may prove in the bankruptcy of a surety he must be legally entitled to the benefit of the guarantee.

In *In re Barned's Banking Co., Ex parte Stephens* (*t*), M. drew bills upon the B. and A. Company; and the banking company, under an agreement with M., guaranteed the acceptors, who were also a company, that they would supply them with funds to meet the bills. S. discounted the bills, being informed by M. of the guarantee of the banking company, but he gave no notice to the banking company or to the acceptors. Afterwards the banking company and the acceptors suspended payment and were wound up. M. also executed a deed of composition with his creditors. It was held that S. had no equity to rank as a creditor of the banking company in respect of the guarantee.

Lord Justice Page Wood in delivering judgment said: "It is said that the drawer who gets the bills discounted, and has the advantage of this guarantee, by telling another that such a guarantee exists, and raising money on the faith of that, does the same thing as if he assigned the benefit of the guarantee. But the case does not stand in that position, because it is not Mackay, the drawer of the bill, that has this right against Barned's Bank, but it is the acceptors, the British and American

(*r*) *In re Blakeley, Ex parte Aachener Disconto Gesellschaft* (1892), 9 Mor. 173.

(*s*) *In re Hallett & Co., Ex parte Cocks, Biddulph & Co.*, [1894] 2 Q. B. 256.

(*t*) (1868), L. R. 3 Ch. 753.

Company, that have the right. The acceptors are not dealing with this gentleman, and trying to induce him to discount bills for their friends, but the drawer who gets the money says: 'I have bills drawn on a good acceptor, and if you do not think that acceptor is good he is backed by somebody else.' The question is, does that transfer the right which the acceptor has to somebody else? Does it make the discounter of the bill a creditor of the company who has agreed to hold the acceptor harmless? It is clear that cannot be so."

Rights of the Surety.

A surety is entitled at any time to require the creditor to call upon the principal debtor to pay off the debt, or himself to pay off the debt. When he has paid it off, he is at once entitled in the creditor's name to sue the principal debtor (*u*).

The surety is entitled to rely upon any right of set-off which the debtor could have pleaded (*x*).

Upon the bankruptcy of the principal debtor he may prove in respect of his contingent liability (*y*).

Subrogation to Rights of Creditor.—Upon payment of the debt the surety is subrogated to the rights of the creditor (*z*).

So upon the bankruptcy of the principal debtor he has a right to stand in the place of the creditor (*a*).

The right of a surety for a company is similar upon its being wound up (*b*).

Right to Securities.—The surety is entitled to the benefit of all securities for the debt which he guarantees held by the creditor,

(*u*) Per A. L. Smith, L. J., in *Rouse v. Bradford Banking Co.*, [1894] 2 Ch. 32, at p. 75; [1894] A. C. 586.

(*x*) *Murphy v. Glass* (1869), L. R. 2 P. C. 408; *Bechervaise v. Lewis* (1872), 7 C. P. 372; Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 24 (2).

(*y*) *In re Paune, Ex parte Read*, [1897] 1 Q. B. 122; *In re Blackpool Motor Car Co.*, [1901] 1 Ch. 77; *Ex parte Delmar, In re Herepath and Delmar* (1890), 38

W. R. 752. Cf. *Warrington v. Furber* (1807), 8 East, 242.

(*z*) *Tobin v. Kirk* (1893), 80 New York S. C. R. 229.

(*a*) *In re Sass, Ex parte National Provincial Bank*, [1896] 2 Q. B. 12, cited at p. 658, *supra*; *Ex parte Johnson, In re Blumer* (1853), 3 De G. M. & G. 218.

(*b*) *Gray v. Seckham* (1872), L. R. 7 Ch. 680. See *In re Vron Colliery Co.* (1882), 20 Ch. D. 442.

and also to all the equities which the creditor could have enforced in respect of it (c).

This right does not depend upon contract, but is the result of the equity of indemnification which is attendant upon the suretyship: it is accordingly immaterial whether or not the surety knew of the deposit of the securities at the time when he entered into the contract, or whether they were received by the creditor before or after the date of the contract of suretyship (d).

In *Forbes v. Jackson* (f), in December, 1854, S. assigned certain premises and a policy of assurance to secure the repayment of a sum of 200*l.* advanced to him by W., and interest. The proviso for redemption was that, on payment of the money, W. would reassign the premises and policy to S., his executors, administrators, or assigns, or as he or they should direct. F., by the same indenture, as surety, covenanted, for himself only, with W. that, while the 200*l.* or any part should remain owing, he would pay the interest and premiums, and he also assigned a policy on his own life, and covenanted to pay the premiums. W. at four different periods between May, 1856, and May, 1866, advanced moneys amounting to 530*l.* to S. on the security of the same premises. S. made default in the payment of interest. W. died in 1878, and his executors made a demand upon F. for all arrears, which he paid, and he also paid the premiums on the policy of S. It was held that F. was entitled to have a transfer of all the securities on paying what was due upon the mortgage of December, 1854.

If, after the contract of guarantee has been made, the creditor makes further advances to the debtor upon a security in his hands, the surety will take priority over the creditor, as against the security, as to these subsequent advances (g).

Sect. 5 of the Mercantile Law Amendment Act (h) provides that—Every person who, being surety for the debt or duty

(c) *Duncan, Fox & Co. v. North and South Wales Bank* (1880), 6 A. C. 1; *Imperial Bank v. London and St. Katherine's Dock Co.* (1877), 5 Ch. D. 195; *Goodwin v. Gray* (1874), 22 W. R. 312 (where the principle was applied to the lien of a banking company upon the shares of its customer).

(d) *Bechervaise v. Lewis* (1872), 7 C. P. 372; *Forbes v. Jackson*, see note (f), *infra*; *Campbell v. Rothwell* (1877), 38 L. T. 33.

(f) (1881), 19 Ch. D. 615.

(g) *Leicestershire Banking Co. v. Hawkins* (1900), 16 T. L. R. 317.

(h) 19 & 20 Vict. c. 97.

of another, or being liable with another for any debt or duty, shall pay such debt or perform such duty, shall be entitled to have assigned to him, or to a trustee for him, every judgment, specialty, or other security which shall be held by the creditor in respect of such debt or duty, whether such judgment, specialty, or other security shall or shall not be deemed at law to have been satisfied by the payment of the debt or performance of the duty, and such person shall be entitled to stand in the place of the creditor, and to use all the remedies, and, if need be, and upon a proper indemnity, to use the name of the creditor, in any action, or other proceeding, at law or in equity, in order to obtain from the principal debtor, or any co-surety, co-contractor, or co-debtor, as the case may be, indemnification for the advances made and loss sustained by the person who shall have so paid such debt or performed such duty, and such payment or performance so made by such surety shall not be pleadable in bar of any such action or other proceeding by him: provided always, that no co-surety, co-contractor, or co-debtor shall be entitled to recover from any other co-surety, co-contractor, or co-debtor, by the means aforesaid, more than the just proportion to which, as between those parties themselves, such last-mentioned person shall be justly liable.

The surety is only entitled to have an assignment of the security if he has paid the debt in full (*i*). But where he has done this his right to stand in the creditor's place does not depend upon his actually obtaining an assignment of the securities (*k*).

The indorser of a bill of exchange is a surety for the payment of it to the holder, and, having paid it, is entitled to the benefit of any securities to cover it deposited with the holder by the acceptor, whether at the time of his indorsement he knew or did not know of the deposit of those securities.

In *Duncan, Fox & Co. v. North and South Wales Bank* (*l*) S. C. R., one of the partners of S. R. & Sons, in December, 1874, deposited with the N. & S. W. Bank the title-deeds of two of his own freehold properties, and signed a memorandum acknowledging them to be deposited as securities for what the N. & S. W.

(*i*) *Ewart v. Latta* (1865), 4 Macq. H. L. R. 983.

(*k*) *In re M'Myn, Lightbown v. M'Myn* (1886), 33 Ch. D. 575.

(*l*) (1880), 6 A. C. 1.

Bank might advance to the firm in the way of discounts. In November, 1875, D. & Co. sold to R. & Sons a cargo of corn to be paid for in cash. Cash was paid only for part. R. & Sons offered a bill of exchange for the rest, which was declined. D. & Co. were customers of the N. & S. W. Bank. R. & Sons said if D. & Co. would inquire of those bankers they would find it would be all right with the R. bills. The bank manager refused to discount the bill without the indorsement of D. & Co., but said that he believed D. & Co. would incur no more than a nominal liability by putting their names on the bill. D. & Co. thereupon consented to take the bill, indorsed it in the ordinary way, and it was discounted by the bank and carried to their credit. In January, 1876, R. & Sons stopped payment. The bill became due in February, and was dishonoured. D. & Co., who then became acquainted with the fact that securities had been deposited with the bankers to cover advances on R. & Sons' bills, brought an action against the N. & S. W. Bank to have the benefit, so far as they would go, of the securities deposited in December, 1874, claiming to be sureties to the bankers for what was due upon the bill. It was held that D. & Co. were sureties on the bill, and that as such they were entitled to the benefit of these securities (*ll*).

A surety who has paid the debt is also entitled to the benefit of any security which a co-surety has taken from the principal debtor by way of indemnity (*m*).

Waiver of Rights.—But the surety may expressly or impliedly waive the rights of standing in the creditor's place as regards securities and equities, and in bankruptcy.

In *Midland Banking Co. v. Chambers* (*n*) a bank permitted a customer to overdraw his account upon having a guarantee from a surety to the extent of 300*l.*, which guarantee provided that all dividends, compositions and payments received on account of the customer should be applied as payments in gross, and that the guarantee should apply to and secure any ultimate balance that should

(*ll*) Cf. *Nicholas v. Ridley*, [1904] 1 Ch. 192.

(*m*) *Swain v. Wall* (1642), 1 Ch. R. 80 [149]; *In re Albert Life Assurance Co.*, *Ex parte Western Life Assurance Co.*

(1870), 11 Eq. 164, at p. 177. Cf. *Cooper v. Jenkins* (1863), 32 Beav. 337; *Steel v. Dixon* (1881), 17 Ch. D. 825.

(*n*) (1869), L. R. 4 Ch. 398.

remain due to the bank. The customer gave the surety a mortgage on part of his estate by way of indemnity. Afterwards the customer compounded with his creditors by a deed which provided for the administration of the assets as in bankruptcy. His banking account was overdrawn 410*l.* The mortgage was realized, and the surety paid the bank the 300*l.* secured by it. It was held that the bank was not restricted to proof for the balance of 110*l.*, but was entitled to receive dividends on the whole 410*l.*, not receiving in the whole, including the 300*l.*, more than 20*s.* in the pound.

"The principle," said Lord Justice Giffard, "is this—if the surety had paid the 300*l.* out of his own money he would have had the benefit of proof for that amount, and that benefit he has relinquished in favour of the plaintiffs. The argument that it has been paid out of the debtor's estate is a fallacy; it was paid out of something which, having before the execution of the creditors' deed been dedicated to the purpose of indemnifying the surety, was not, at the time of the execution of that deed, part of the debtor's estate. Such a payment stands on the same footing as if it had been made by Thorpe out of his own moneys, and furnishes no ground for reducing the proof."

So, in *Ex parte Midland Banking Co., In re Sellers (o)*, where the guarantee was in similar terms, upon the debtor becoming insolvent the surety paid the sum named as the limit of his liability to the bank; and the question then arising whether he or the bank was entitled to prove for the amount, it was held that, the surety having by the guarantee contracted himself out of the right which he would otherwise have had in favour of the bank, the latter was entitled to prove for the whole amount of its debt, including the sum so paid (*p*).

Right to Contribution.—A surety has a right, depending upon the general principles of equity and not on the form or nature of his contract, to contribution from his co-sureties, as soon as he has paid more than his proportion of the principal debt (*q*). This

(*o*) (1878), 38 L. T. 395.

(*p*) See also *In re Sass, Ex parte National Provincial Bank*, cited at p. 658, *supra*; *Waugh v. Wren* (1862), 11 W. R. 244; *Cooper v. Jenkins* (1863), 32 Beav. 337;

Ellis v. Emmanuel, cited at p. 658, *supra*.

(*q*) *Deering v. Winchelsea* (1800), 2 B. & P. 270; *In re Ennis, Coles v. Peyton*, [1893] 3 Ch. 238, at p. 242; *In re Parker, Morgan v. Hill*, [1894] 3 Ch. 400; *Greenwood v.*

right exists whether the sureties are bound jointly, or jointly and severally (*r*), or by the same or different documents (*s*).

Where the sureties have bound themselves in different amounts, they are liable to contribute to the satisfaction of the creditor's claim in proportion to the limits of their respective liabilities and not in equal amounts (*t*).

In *Macdonald v. Whitfield* (*u*) the directors of a company had mutually agreed with each other to become sureties to the bank for the same debts of the company, and in pursuance of that agreement had successively indorsed three promissory notes of the company. It was held that they were entitled and liable to equal contribution *inter se*, and were not liable to indemnify each other successively according to the priority of their indorsements.

Lord Watson, delivering the judgment of the Judicial Committee of the Privy Council, said (*x*): "The appellant has not attempted to establish an independent collateral agreement by the respondent to contribute equally with him and the other indorsers in the event of the company's failure to make payment of the notes in question to the bank. He relies upon the facts proved with respect to the making and issue of these three promissory notes as sufficient in themselves to create the legal inference that all the directors of the company, including the respondent, put their signatures upon the notes, in August, 1875, in pursuance of a mutual agreement to be co-sureties for the company. And in the opinion of their Lordships that is the proper legal inference to be derived from the circumstances of the present case."

His Lordship distinguished the case of *Steele v. McKinlay* (*y*), pointing out that there parol evidence tendered in order to establish an independent contract of guarantee was rejected upon the ground that such a contract could only be proved by a writing properly signed.

A surety against whom judgment has been obtained by the

Francis, [1899] 1 Q. B. 312. See also *Ex parte Snowden* (1881), 17 Ch. D. 44.

(*r*) Per Lord Eldon in *Underhill v. Horwood* (1804), 10 Ves. 208.

(*s*) *Craythorne v. Swinburne* (1807), 14 Ves. 160, 169, 170, discussed in *Ex parte Snowden* (1881), 17 Ch. D. 44; *In re*

Denton's Estate, [1903] 2 Ch. 670.

(*t*) *Ellesmere Brewery Co. v. Cooper*, [1896] 1 Q. B. 75; *In re Denton's Estate*, [1903] 2 Ch. 670.

(*u*) (1883), 8 A. C. 733.

(*x*) At p. 745.

(*y*) (1880), 5 A. C. 754.

principal creditor for the full amount of the guarantee, but who has paid nothing in respect thereof, can maintain an action against a co-surety to compel him to contribute towards the common liability; and for this purpose the allowance of a claim by the principal creditor against the estate of a deceased surety is equivalent to a judgment; and where the principal creditor is a party to the action, the surety may obtain an order upon the co-surety to pay his proportion to the principal creditor. Where the principal creditor is not a party, he may obtain a prospective order directing the co-surety, upon payment by the surety of his own share, to indemnify him against further liability (z).

A surety seeking contribution must bring whatever he has received from the principal debtor into account (a).

There will be no right of contribution if the sureties are bound only for distinct and defined portions of the debt of the principal debtor (b).

The Statute of Limitations does not begin to run against a surety suing a co-surety for contribution until the liability of the surety is ascertained, that is to say, until the claim of the principal creditor has been established against him, although at the time of the action for contribution the statute may have run as between the principal creditor and the co-surety (z).

DISCHARGE OF SURETY.

Payment of Debt.

Payment of the debt by the principal debtor will of course discharge the surety. Payment of a part will discharge him *pro tanto* (c).

(z) *Wolmershausen v. Gullick*, [1893] 2 Ch. 514.

(a) *Steel v. Dixon* (1881), 17 Ch. D. 825; *In re Arcedeckne, Atkins v. Arcedeckne* (1883), 24 Ch. D. 709; *Berridge v. Berridge* (1890), 44 Ch. D. 168.

(b) *Coope v. Twynam* (1823), 1 T. & Russ. 426; *Pendlebury v. Walker* (1841),

4 Y. & C. Ex. 424; *Arcedeckne v. Howard* (1872), 20 W. R. 879.

(c) See *Guardians of Lichfield Union v. Greene*, cited at p. 526, *supra*. It will be the same if the debt is satisfied by an agreement on the part of a new firm to take it over: *Allaway v. Harris* (1860), 29 L. J. Ex. 214.

But a payment which is set aside as a fraudulent preference, the creditor having received it without knowledge of the circumstances rendering it such, will not have the effect of discharging the surety (*d*).

Appropriation of Payment.—In some cases a difficulty arises in determining whether a payment by the debtor is to be treated as made on account of the debt guaranteed, or in respect of some other debt due from him to the same creditor.

For the general rules as to appropriation of payments, reference should be made to pp. 166—175.

In *Bodenham v. Purchas* (*e*) a bond had been given to the several persons constituting the firm of a banking-house, conditioned for the repayment of the balance of an account, and of such further sums as the bankers might advance to the obligor. One of the partners died, and a new partner was taken into the firm. At that time a considerable balance was due from the obligor to the firm. Advances were afterwards made by the bankers, and payments made to them on account by the obligor. The latter was credited by the new firm with the several payments, and charged with the original debt and subsequent advances as constituting items in one entire account, and the balance due at the time of the partner's death was considerably reduced, and that reduced balance, by order of the obligor, was transferred by the bankers to the account of another customer, who, with his assent, was charged with the then debt of the obligor. The person so charged having become insolvent, the surviving partners of the original firm brought their action upon the bond. It was held that, as they had not originally treated it as a distinct account, but had blended it in the general account with other transactions, they were not at liberty so to treat it at a subsequent period; and that, having received in different payments a sum more than sufficient to discharge the debt due upon the bond at the time of the death of the deceased partner, the bond was to be considered as paid.

(*d*) *Petty v. Cooke* (1871), L. R. 6 Q. B. 790; 40 L. J. Q. B. 281.

(*e*) (1818), 2 B. & Ald. 39.

The judges considered the case covered by the principle of *Clayton's Case* (*f*). It was therefore unnecessary to determine whether the transfer by the plaintiffs of the balance due from the obligor to the account of another, with his assent, operated in law as a payment of so much of the obligor's debt, and a re-loan of the same sum to the other by the bankers. Holroyd, J., expressed the view that it did.

In *Pease v. Hirst* (*g*) A., wishing to obtain credit with his bankers, in 1817, prevailed upon three persons to join him in a promissory note, whereby they jointly and severally promised to pay the bankers or order 300*l*. The bankers gave A. credit in his pass-book for 300*l*. on account of the note, and charged him with interest for the same yearly. Upon two of the partners retiring from the banking-house a balance was struck between the old and new firm, and the promissory note was delivered to the new firm, but not indorsed to them. A. at one time had in the hands of his bankers a balance exceeding the amount of the note. He paid interest to the banking-house annually. It was held that the note being payable to the five members of the banking-house or order, and being evidently intended to be a continuing security, the makers were liable upon it, notwithstanding a change in the members of the banking-house; and that the note was not discharged by reason of A. at one time having in the hands of the banker a balance exceeding in amount the sum secured by the note.

In delivering judgment, Bayley, J., said: "Another objection is, that this note was discharged by a balance belonging to Jonathan Hirst, which afterwards came into the hands of the banker. It was contended that the plaintiffs are bound to consider the debt due on the note as paid and wiped off by that balance. It does not appear that that was a cash balance; but, if it had been, the bankers would not have been bound to apply it in payment of the note. It would be directly contrary to the intention for which the note was given that it should be paid off by the first money of Jonathan Hirst which came to the hands of the bankers. If the persons who were in substance, though not in form, sureties had

(*f*) (1816), 1 Mer. 572; see p. 167, *supra*.

(*g*) (1829), 10 B. & C. 122.

desired the bankers so to apply the balance, they, perhaps, would have been bound so to apply it."

So, in *Strong v. Foster* (*h*), it was held that the facts that the banker had funds to the credit of the customer shortly after a promissory note, given by himself and a surety, which was never entered in the account, had become due, and had abstained from applying those funds in discharge of the note, would not support a plea of payment on the part of the surety.

"It would," said Jervis, C. J. (*i*), "be essentially altering the position of parties, to establish that, because a banker who holds a note of a third person for a customer has a balance in his hands in the customer's favour at the maturity of the note, such third person is thereby discharged, if it turns out that the note was given by him as surety."

In *Kinnaird v. Webster* (*k*) a customer borrowed from his bankers 2,000*l.*, which was placed to the credit of his current account, and to secure the debt gave them ten promissory notes payable at intervals of a week. At the same time a friend of the borrower wrote to the bankers as follows: "You having this day at my request placed the sum of 2,000*l.* to the credit of Mr. C.'s" (the borrower's) "account with you, in the event of his promissory notes and interest or any of them representing that amount not being paid at the due dates, I hereby undertake, upon demand, to secure payment of the same," by a mortgage of certain specified property. On the first five due dates the sums represented by the first five notes respectively were debited by the bankers to the customer in the current account; and on each of the first two due dates enough cash was paid in to the account in the course of the day to liquidate the amount of the note. On the remaining three days the balance throughout the day was against the customer. The amounts of the last five notes were not entered by the bankers in the account at all. The payments in to the credit of C. to his current account and to another special account after the last note became due were sufficient to cover all debits up to and including the last note, but the accounts were during all this time overdrawn.

(*h*) (1855), 17 C. B. 201.

(*i*) At p. 217.

(*k*) (1878), 10 Ch. D. 139; 48 L. J. Ch. 348.

It was held that the bankers were bound to apply all moneys paid in first to the notes secured by the surety which had fallen due; and that the debt was, moreover, discharged on the principle of *Clayton's Case* (l).

In view of the two cases next cited, it may be doubted whether *Kinnaird v. Webster* can be relied upon as an authority (m). At all events, the presumption that, where a variety of transactions are included in one general account, the items of credit are to be appropriated to the items of debit in order of date in the absence of other appropriation, may be rebutted by circumstances of the case showing that such could not have been the intention of the parties.

This is illustrated by *City Discount Co. v. McLean* (n). There the plaintiffs, a discount company, were in the habit of discounting bills for S. In consideration that the plaintiffs would advance money to a certain amount to S. on the deposit of a lease of S.'s premises, the defendant guaranteed any part of the money so advanced that might remain due after the realization of the leasehold security, the guarantee to last for a period not exceeding two years. Advances were made to S. by the plaintiffs in accordance with the guarantee, and a great number of other transactions by way of further advance upon the discount of bills by the plaintiffs for S. took place in the usual course of business between them. Within two years from the date of the guarantee, S. failed, owing to the plaintiffs an amount exceeding the sum guaranteed. A long debtor and creditor account was kept by the plaintiffs of their transactions with S. during such time, including the advances made under the guarantee. The aggregate of the items on both sides of the account very largely exceeded the amount of the sum guaranteed. In this account the practice was to credit S. with the amount of the bills discounted, less discount and commission, and debit him with the amount of the bills if they were dishonoured. Many of the bills discounted were renewed at maturity, and the

(l) See p. 167, *supra*.

(m) See also, as to this case, *In re Booth, Browning v. Baldwin* (1879), 40 L. T. 248, at p. 249; 27 W. R. 644, at p. 645.

(n) (1874), 9 C. P. 692. See also *Stoveld v. Eade* (1827), 4 Bing. 154; *Wilson v. Hirst* (1833), 4 B. & Ad. 760, at p. 766.

same system of crediting and debiting applied to the renewals. The account was balanced on several occasions before S. failed, and showed balances against S. of much less amount than the sums advanced under the guarantee, but these balances were arrived at by crediting S. with the amount of outstanding bills, many of which were not paid at maturity, and were included in the ultimate balance against S. Bills were discounted with the plaintiffs by S. to cover advances made under the guarantee, and were from time to time renewed, but never paid. Bills, discounted by S. with the plaintiffs after the advances under the guarantee, had been paid to an amount exceeding the sum guaranteed, but it did not appear that in point of fact the balance really due from S. to the plaintiffs after the date of the guarantee was ever less than the sum guaranteed. In an action on the guarantee to recover the moneys advanced under it, it was held that, under the circumstances of the case, it could not have been the intention of the plaintiffs and S., by the mode in which the account between them was kept, that the advance under the guarantee should be considered as satisfied by the items of credit therein, and consequently that the action was maintainable.

"It may be," said Mr. Justice Blackburn, "as a general rule in ordinary cases, and if there is nothing to show a contrary intention, the items of credit must be appropriated to the items of debit in order of date, and that the half-yearly account rendered would constitute a fresh point of departure. *Clayton's Case* (o) and other similar cases show that when a partner dies and there is a change of the partnership, and the transactions with the new and old firms are all mixed up together in one account, the law treats the whole as one entire account, and applies the items of credit to those of debit according to date, in favour of the estate of the deceased partner. But when the parties remain the same, the question is whether the rendering of the account amounts to an appropriation of the items to one another in order of date. In such a case as this, where the earlier items constituting the 5,000*l.* were secured by a mortgage and a guarantee, it never could have been the intention that they should be so appropriated. But it is contended that as

(o) (1816), 1 Mer. 572; see p. 167, *supra*.

a matter of law, though there is no authority so deciding, or as an inference of facts, though it is contrary to all probability, we are bound to hold that the 5,000*l.* is to be considered as paid off; and if so paid off, it follows that it must be treated as paid off in six months, though by the terms of the guarantee a period of two years was contemplated. I cannot draw such an inference, either as matter of law or of fact. The true rule is that laid down in *Henniker v. Wigg* (*p*), which is that accounts rendered are evidence of the appropriation of payments to the earlier items, but that may be rebutted by evidence to the contrary. Lord Denman, C. J., referring to the rule in *Clayton's Case*, there says, 'It is equally certain that a particular mode of dealing, and more especially any stipulation between the parties, may entirely vary the case.' That judgment seems to me to be sound sense. Here the surety had nothing to do with the accounts. Southgate executed a mortgage and procured a guarantee to last for two years. Is it not obvious that it was meant that the 5,000*l.* was not to be considered as paid off out of the first amounts credited to Southgate in the course of the subsequent discount transactions, but was to stand over and be treated independently of such transactions? If so, this rebuts any presumption arising from the state of the accounts. It does not appear that in point of fact the balance due was ever less than 5,000*l.* after the advance" (*q*).

In *In re Sherry, London and County Banking Company v. Terry* (*r*), S. guaranteed the account of T. at a bank by two guarantees, one for 150*l.*, the other for 400*l.* By the terms of the guarantees the surety guaranteed to the bank "the repayment of all moneys which shall at any time be due from" the customer "to you on the general balance of his account with you"; the guarantee was, moreover, to be "a continuing guarantee to the extent at any one time of" the sums respectively named, and was not to be considered as wholly or partially satisfied by the payment at any time of any sums due on such general balance; and any indulgence granted by the bank was not to prejudice the guarantee. S. having died, leaving T. and another executors, the bank, on receiving notice of

(*p*) (1843), 4 Q. B. 792; see p. 657, *supra*.

(*q*) Cf. *Wythes v. Labouchere* (1858), 3 De G. & J. 593.

(*r*) (1884), 25 Ch. D. 692.

his death, without any communication with the executors beyond what would appear in T.'s pass-book, closed T.'s account, which was overdrawn, and opened a new account with him, in which they did not debit him with the amount of the overdraft, but debited him with interest on the same, and continued the account until he went into liquidation when it also was overdrawn. It was held that there was no contract, express or implied, which obliged the debtor and creditor to appropriate to the old overdraft the payments made by the debtor after the determination of the guarantee, and that the bank were entitled to prove against the estate of S. for the amount of the old overdraft less the amount of the dividend which they had received on it in the liquidation.

In giving judgment in the Court of Appeal, the Earl of Selborne, L. C., said: "The principle of *Clayton's Case*, and of the other cases which deal with the same subject, is this, that where a creditor having a right to appropriate moneys paid to him generally, and not specifically appropriated by the person paying them, carries them into a particular account kept in his books, he *prima facie* appropriates them to that account, and the effect of that is, that the payments are *de facto* appropriated according to the priority in order of the entries on the one side and on the other of that account. It is, of course, absolutely necessary for the application of those authorities that there should be one unbroken account, and entries made in that account by the person having a right to appropriate the payment to that account; and the way to avoid the application of *Clayton's Case*, where there is no other principle in question, is to break the account and open a new and distinct account. When that is done, and the payment is entered to that new and distinct account, whatever other rule may govern the case, it certainly is not the rule of *Clayton's Case* or of *Bodenham v. Purchas* (s), and other authorities of that class. In this case the account was broken. It was not continued; and, if he had a right to do so, the creditor receiving moneys after the death of Mr. Sherry elected to appropriate them to the new account, and not to the old account, whatever might be the proper consequences of that election. Therefore, we are remitted to the question whether

(s) See p. 669, *supra*.

there was here an express or an implied contract to appropriate these moneys in reduction of the secured or guaranteed debt. If there was, of course, that contract could not be defeated by any mode of keeping the account which the creditor might prefer; the contract must prevail; and in that case, no doubt, the principle of *Pearl v. Deacon* (t), which dealt with securities (and I agree that moneys which by contract are appropriated to a particular purpose stand as regards the surety on the same footing as securities), would be applicable." His Lordship then proceeded to point out that no such express or implied contract existed in the case.

Lord Justice Cotton expressed himself as follows: "As far as I can see, the only implied contract is that the account shall be carried on in accordance with the general practice of bankers; and that really answers what has been suggested, that this case does not differ from an attempt by a bank to make a new account during the lifetime of the surety, that is to say, before the guarantee terminates. The balance which the surety guarantees is the general balance of the customer's account, and to ascertain that, all accounts existing between the customer and the bank at the time when the guarantee comes to an end, must be taken into consideration. So that it would be impossible for the bank to say, to the prejudice of the surety, 'We carry these sums which have been paid by the customer not to an account of which we ascertain the balance, but to a new account, and we refuse to bring those sums to the credit of his banking account to the relief of the surety.' That is quite a different thing, and would be an improper dealing, improper in this sense, that it would prevent the balance of the account from being ascertained in accordance with the terms of the guarantee. But here the account to which these payments have been appropriated is one which, according to the contention of the surety, is not guaranteed in any way, being an account after the death of the surety, and there being nothing in the contract relating to the mode in which the bank was to deal as regards that account, there is nothing to prevent the bank from acting as they have done" (u).

(t) (1857), 1 De G. & J. 461.

(u) See also *Williams v. Rawlinson*, cited at p. 655, *supra*.

Deposit to Suspense Account.—In *Commercial Bank of Australia v. Official Assignee of the Estate of Wilson & Co. (x)* a bankrupt and others had become guarantors to the appellants of a principal debtor's liability for the sum of 6,250*l.*, and three of the guarantors thereafter entered into an agreement with the appellants that their liability should be limited in this way, that there should be substituted for it a deposit of 3,000*l.* in the bank, to be carried to a suspense account, with power to the appellants to appropriate that sum whenever they thought fit in discharge *pro tanto* of the principal debt. It was held that such deposit did not, until appropriation, operate as payment, and that the appellants were entitled to prove for the full amount of their debt against the estate of a bankrupt co-surety, who was not a party to the above agreement.

Lord Chancellor Herschell, delivering the judgment of the Judicial Committee, said: " Their Lordships have pointed out that it certainly was the intention of the parties to this agreement that the principal debt should not be discharged. It is said that this has nevertheless been done in spite of the intention of the parties. Their Lordships are unable to agree that that is so. The arrangement which the agreement embodies appears to their Lordships to amount to this—that the liability of the guarantors who were dealt with by that agreement should, in lieu of their personal liability to pay the entire sum guaranteed in case of default of the principal debtor, be as between them and the bank limited in this way, that there should be substituted for it the deposit in the bank of a sum of money less than the whole amount, but which should afford a complete security to the bank *quoad* the amount to which it extended. Accordingly the sum of 3,000*l.*—taking the promissory notes, they having been paid, as equivalent to cash—was deposited in the bank to a suspense account. The bank no doubt had power, when it thought it prudent to do so, to appropriate that sum to the payment of the principal debt *pro tanto*, and as soon as they made such appropriation it would undoubtedly operate as payment. They never have made such appropriation. The question is whether, prior to appropriation, it operated as payment of the debt. Their Lordships are unable to see why it should do so. The money

was put to a special account called a suspense account, presumably in the names of these guarantors who had paid it in. At all events it was ear-marked as a special account. Down to the time of appropriation by the bank of this amount, their Lordships are unable to see anything which could discharge the principal debtor. If that debtor had come and tendered the entire amount due, the bank would have been neither justified, as it appears to their Lordships, in saying, nor bound to say that, 3,000*l.* of the amount having been already paid, all that they were in a position to receive was the residue. Upon the whole of the terms of the agreement there appears to be nothing more than a substitution of a certain sum of money deposited in the bank as security, in lieu of the personal liability of guarantors which down to that time had rested upon these persons who were parties to the agreement with the bank."

Notice of Revocation or Death.

Whether, and to what extent, and in what manner, a guarantee is revocable appears to depend, in the absence of express provision, upon its nature. If the consideration has been given once and for all, the guarantee cannot be determined by notice, or even by the death of the surety; whereas, if the consideration is given from time to time in the shape of separate advances, apparently it is revocable so far as concerns advances made after the date of notice of revocation or of death.

Express Revocation.—In *Offord v. Davies* (*y*) the guarantee was in the following form: "We, the undersigned, in consideration of your discounting, at our request, bills of exchange for Messrs. Davies and Co., of Newtown, Montgomeryshire, drapers, hereby jointly and severally guarantee, for the space of twelve calendar months, the due payment of all such bills of exchange to the extent of 600*l.* And we further jointly and severally undertake to make good any loss or expenses you may sustain or incur, in consequence of advancing Messrs. Davies & Co. such monies." (Signed by the defendants.) It was held that this guarantee might be revoked

(*y*) (1862), 12 C. B. N. S. 748; 31 L. J. C. P. 319.

by a notice given during the twelve months, although some discounts had been effected and repaid before notice.

Erle, C. J., delivering the judgment of the Court of Common Pleas, said: "This promise by itself creates no obligation. It is in effect conditioned to be binding if the plaintiff acts upon it, either to the benefit of the defendants or to the detriment of himself. But, until the condition has been at least in part fulfilled, the defendants have the power of revoking it. In the case of a simple guarantee for a proposed loan, the right of revocation before the proposal has been acted on did not appear to be disputed. Then, are the rights of the parties affected either by the promise being expressed to be for twelve months, or by the fact that some discounts had been made before that now in question, and repaid? We think not. The promise to repay for twelve months creates no additional liability on the guarantor, but, on the contrary, fixes a limit in time beyond which his liability cannot extend. And, with respect to other discounts which had been repaid, we consider each discount as a separate transaction, creating a liability on the defendant till it is repaid, and after repayment leaving the promise to have the same operation that it had before any discount was made, and no more."

In *In re Crace, Balfour v. Crace* (z), it was held that where a bond is given by a surety for the integrity of a person, in consideration of that person's being appointed to an office by the obligee of the bond, the liability of the surety will not, unless expressly so stipulated in the bond, be determined by his death.

"I think," said Mr. Justice Joyce, "it is undoubted law that a continuing guarantee not under seal for future advances, if not so framed as to become operative before it is acted on, may be revoked or withdrawn altogether before being acted on, and as to further or future transactions may be terminated at any time unless the contrary be expressly stipulated. Now, the reasons for this in the case of such a guarantee are, I think, pretty obvious on a moment's consideration, and they are put very lucidly in the judgment of Erle, C. J., in *Offord v. Davies* (a). When such a guarantee is under seal, I think it has been held at law that the

(z) [1902] 1 Ch. 733.

(a) See p. 678, *supra*.

guarantor is not entitled by notice to determine its operation. But in equity I think, even in the case of a continuing guarantee under seal, such a guarantee as that I have mentioned, where, as Lush, L. J., puts it in the case of *Lloyd's v. Harper* (b), 'the consideration is fragmentary, supplied from time to time, and therefore divisible,' the operation of the guarantee as to future transactions may be determined by notice. Now, the right to determine or withdraw a guarantee by notice forthwith cannot possibly exist, in my opinion, when the consideration for it is indivisible, so to speak, and moves from the person to whom the guarantee is given once for all, as in the case of the consideration being the giving or conferring an office or employment upon any person whose integrity is guaranteed. It is impossible that the guarantor should be entitled by notice, unless he has expressly so stipulated, to determine that guarantee *instantly*" (c).

Death of Surety.—In *Bradbury v. Morgan* (d) J. L. had given a guarantee to the following effect: "Messrs. B. & Co.—I request you will give credit in the usual way of your business to H. L.; and in consideration of your doing so I hereby engage to guarantee the regular payment of the running balance of his account with you, until I give you notice to the contrary, to the extent of 100*l*." It was held that the liability was not determined by the death of J. L., but that his executors were liable to B. & Co. for goods sold and credit given to H. L. subsequent to the death.

In *In re Silvester, Midland Rail. Co. v. Silvester* (e), a joint and several continuing guaranty bond provided that the obligors, or any one or more of them, or their respective "representatives," might determine their or his liability by a month's notice in writing to the obligees. One of the obligors having died, his executor, who was unaware of the bond, gave the obligees notice only of his death. It was held that "representatives" included executors, and that, notwithstanding the notice, the estate of the deceased obligor was liable for indebtedness incurred by the principal debtors after his death (f).

(b) See p. 681, *infra*.

(e) [1895] 1 Ch. 573.

(c) See further as to this case, p. 79, *supra*.

(f) See the observations upon this case in *Harriss v. Fawcett* (1873), 15 Eq. 311; 8 Ch. 860, at p. 868.

(d) (1862), 31 L. J. Ex. 462; 1 H. & C. 249.

On the other hand, the following cases tend to indicate that a banker could not safely rely as to future advances upon a guarantee of a current account after notice of the guarantor's death.

In *Harriss v. Fawcett* (g) a guarantee was determinable by six months' notice. The guarantor died, leaving as his executor the debtor on whose behalf the guarantee was given. The creditors to whom the guarantee was given continued to make advances to the debtor, knowing that there was no personal estate to answer the guarantee. It was held that, under the circumstances, the creditors were not entitled to the benefit of the guarantee for their advances subsequent to the death. But Lord Justice Mellish pointed out that the death alone did not determine the guarantee.

In *Coulthart v. Clementson* (h) it was held by Bowen, J., that a continuing guarantee, in the absence of express provision, was revoked as to subsequent advances by notice of the death of the guarantor. So far as a current account at a bank is concerned, this view is supported by the case of *In re Sherry, London and County Banking Co. v. Terry* (i).

In *Lloyd's v. Harper* (k), where it was held that a guarantee, the consideration for which is given once for all, cannot be determined by the guarantor, and does not cease on his death, the Court left open the question whether a guarantee for future advances, which the party guaranteed is not bound to make, is not determinable by the guarantor, and whether it does not cease on notice of his death.

Reference should be made in this connection to pp. 79—81 of this treatise.

Death of Co-Surety.—The death of one of the co-sureties under a joint and several continuing guarantee does not by itself determine the future liability of the surviving co-surety (l).

(g) See last note.

(h) (1879), 5 Q. B. D. 42.

(i) Cited at p. 674, *supra*.

(k) (1880), 16 Ch. D. 290.

(l) *Beckett & Co. v. Addyman* (1882), 9 Q. B. D. 783. See also *Ashby v. Day* (1886), 54 L. T. 408; 34 W. R. 312.

Changes in Composition of Firm or Company.

The Partnership Act (*m*) provides—

18. A continuing guaranty or cautionary obligation given either to a firm or to a third person in respect of the transactions of a firm is, in the absence of agreement to the contrary (*n*), revoked as to future transactions by any change in the constitution of the firm to which, or of the firm in respect of the transactions of which, the guaranty or obligation was given (*o*).

The position will be similar in the case of the amalgamation of a company, unless it takes place under a special Act which expressly provides to the contrary (*oo*).

Alteration of Contract.

If, while the instrument of guarantee is in the hands of the creditor, it is materially altered, as, for example, by the addition of a seal opposite the name of the surety, without his consent, it will be avoided (*p*). A like consequence may be entailed by an alteration of the agreement as between the principal debtor and the creditor.

“The true rule in my opinion is,” said Cotton, L. J., in his judgment in *Holme v. Brunskill* (*q*), in which Thesiger, L. J., concurred, “that if there is any agreement between the principals with reference to the contract guaranteed, the surety ought to be consulted, and that if he has not consented to the alteration, although in cases where it is without inquiry evident that the alteration is unsubstantial, or that it cannot be otherwise than beneficial to the surety, the surety may not be discharged; yet, that if it is not self-evident that the alteration is unsubstantial, or one which cannot be prejudicial to the surety, the Court will not, in an action against the surety, go into an inquiry as to the effect of the alteration, or allow the question, whether the surety is discharged or not, to be

(*m*) 53 & 54 Vict. c. 39.

(*n*) See *Barclay v. Lucas* (1783), 3 Doug. 321; *Metcalf v. Bruin* (1810), 12 East, 400; *Pease v. Hirst* (1829), 10 B. & C. 122; *Wilson v. Craven* (1841), 8 M. & W. 584.

(*o*) See *Wright v. Russel* (1774), 2 W. Bl. 934; 3 Wils. 530; *Strange v. Lee* (1803), 3 East, 484; *Dance v. Girdler*

(1804), 1 B. & P. N. R. 34; *Chapman v. Beckinton* (1842), 3 Q. B. 703.

(*oo*) See *Eastern Union Rail. Co. v. Cochrane* (1853), 9 Ex. 197; *L. B. & S. C. Rail. Co. v. Goodwin* (1849), 3 Ex. 320.

(*p*) *Davidson v. Cooper* (1844), 13 M. & W. 343.

(*q*) (1878), 3 Q. B. D. 495, at p. 505.

determined by the finding of a jury as to the materiality of the alteration or on the question whether it is to the prejudice of the surety, but will hold that in such a case the surety himself must be the sole judge whether or not he will consent to remain liable notwithstanding the alteration, and that if he has not so consented he will be discharged."

"The question whether the position of the sureties has been altered is a question of fact, not of law. There may be facts which would make it obviously impossible not to say that in law there is an alteration of the position of the surety" (*r*).

So where A. became surety for B. to C. for a sum "for value received by a draft at three months' date," and C., without the concurrence of A., at once paid the amount to B., instead of giving the draft at three months, it was held that the agreement had been varied, and that the surety was therefore discharged (*s*).

So where a promissory note had been given by a surety as security for a floating balance, and the banker subsequently credited to the customer's account the full amount of the note without advancing it at the time the surety was held to have been discharged (*t*).

Where a person has become surety for the due accounting by another for moneys received by him, the surety will not be answerable for moneys received by him and his partner jointly (*u*).

But where one has entered into a bond as surety for the performance by another of two things which are separate and distinct, a subsequent alteration of the principal's contract as to one of them without the surety's consent does not release the surety from his contract of suretyship as to the other (*x*).

So a guarantee of the payment of bills upon their renewal may cover new bills for the same aggregate amount if the substance of the transaction is that the surety guarantees the debt represented by the old bills (*y*).

(*r*) Per Bowen, L. J., in *Mayor, &c. of Kingston-upon-Hull v. Harding*, [1892] 2 Q. B. 494, at p. 506.

(*s*) *Bonser v. Cox* (1843), 6 Beav. 110.

(*t*) *Archer v. Hudson* (1844), 7 Beav. 551. Upon the appeal to the Lord Chancellor in this case, the judgment of the Master of the Rolls was affirmed on

another ground upon which it had proceeded, the Lord Chancellor giving no opinion as to the release of the surety.

(*u*) *Mills v. Alderbury Union* (1849), 3 Exch. 590.

(*x*) *Harrison v. Seymour* (1866), L. R. 1 C. P. 518.

(*y*) *Barber v. Mackrell*, W. N. (1892) 133.

A mere change in the mode of drawing cheques by the principal will not discharge the surety (z).

Where a surety pledges his personal credit by bond or covenant, and by the same contract pledges also his goods, or mortgages or charges his lands, as security for the same debt, any alteration of the contract by the mortgagee and the principal debtor behind the back of the surety—*e.g.*, by a consolidation deed, with a fresh covenant for payment of the principal sum with other moneys subsequently advanced at a later date—not only discharges the surety from all personal liability, but also releases the property which the surety had included in the contract (a).

Reference should be made in this connection to pages 76—78.

Discharge of Principal Debtor.

Release.—A release of the principal debtor will generally have the effect of discharging the surety also.

"It may be taken as settled law," said Lord Morris, delivering the judgment of the Judicial Committee of the Privy Council in *Commercial Bank of Tasmania v. Jones* (b), "that where there is an absolute release of the principal debtor, the remedy against the surety is gone because the debt is extinguished, and where such actual release is given no right can be reserved because the debt is satisfied, and no right of recourse remains when the debt is gone. Language importing an absolute release may be construed as a covenant by the creditor not to sue the principal debtor, when that intention appears, leaving such debtor open to any claims of relief at the instance of his sureties. But a covenant not to sue the principal debtor is a partial discharge only, and, although expressly stipulated, is ineffectual, if the discharge given is in reality absolute. In this case, the acceptance of Marshall as full debtor, in room and stead of Wakeham, which constituted a complete novation of the debt, necessarily operated as an absolute release of Wakeham, and it is therefore in vain to contend that such novation merely amounted to a covenant not to sue the debtor for whom the respondent was surety."

(z) *Allaway v. Harris* (1860), 29 L. J. Ex. 214.

(a) *Bolton v. Salmon*, [1891] 2 Ch. 48.

(b) [1893] A. C. 313, at p. 316.

In the case in which these words were spoken a creditor had released his principal debtor and accepted a third party as full debtor in his stead, and the surety for the former debtor had agreed to give a guarantee for the latter and to continue his former guarantee until he did so, and then died without having given it. It was held, in an action by the creditor against his executors, that the former debt having been extinguished by the release, the remedy against the deceased was gone.

Reservation of Creditor's Rights.—If the surety has expressly agreed to remain liable after the discharge of the principal debtor, effect will be given to his agreement (*e*).

So a mere covenant on the part of the creditor not to sue the principal debtor, coupled with a reservation of rights against the surety, will not discharge the latter. And a release containing a reservation of the rights of the creditor against the surety will be construed as merely a covenant not to sue (*d*).

Acceptance of Composition.—A surety will not, however, be released by the acceptance by the creditor of a composition or scheme of arrangement on the part of the debtor (*e*).

Discharge by Operation of Law.—If the principal debtor is discharged from his liability by operation of law by becoming a bankrupt or otherwise, the liability of the surety to the creditor is not affected (*f*).

In the case of *In re London Chartered Bank of Australia* (*g*) some customers had deposited money with a bank on the security of deposit notes, and had effected mortgage assurances on such deposits with an insurance company. Subsequently the bank was wound up. A scheme was framed containing no provision that sureties should not be released. It provided for the formation of a new company to take over the business and most of the liabilities

(*e*) *Union Bank of Manchester v. Beech* (1865), 34 L. J. Ex. 133. Cf. *Kirkwood v. Carroll*, [1903] 1 K. B. 531.

(*d*) *North v. Wakefield* (1849), 13 Q. B. 536; *Price v. Barker* (1855), 4 El. & Bl. 760; *Green v. Wynn* (1869), 4 Ch. 204. See also *Hall v. Hutchons* (1833), 3 Myl.

& K. 426.

(*e*) Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 3 (19); Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 30 (4).

(*f*) *Ex parte Jacobs, In re Jacobs* (1875), 10 Ch. 211.

(*g*) [1893] 3 Ch. 540.

of the old company. The remaining liability of 20% on the shares was to be called up immediately, but every shareholder in the old company was entitled to apply for shares in the new company equal in number to his old shares and credited with 15% paid up, and was to be indemnified by the new company against any calls on the old shares. It was held that, as the discharge was by operation of law consequent upon pending statutory liquidation, it was unnecessary, and would not be right, to introduce a reservation of rights against sureties.

In *Dane v. Mortgage Insurance Corporation (h)*, by an instrument purporting to be a "policy of insurance," it was witnessed that the defendants guaranteed to the "assured," the plaintiff, payment of a sum of money deposited by her in a bank in Australia, if the bank should make default in paying the same. The bank made default in payment of the sum deposited. Subsequently to such default a scheme of arrangement between the bank and its creditors was, under the provisions of a statute of the colony, sanctioned by a meeting of creditors and the Colonial Court. By this scheme the bank was to be wound up and a new bank constituted, the creditors becoming entitled to certain rights against the new bank in satisfaction of their debts. The plaintiff did not assent to this scheme, which, however, was binding upon her by the Colonial statute. It was held that the defendants remained liable to the plaintiff under their contract notwithstanding the scheme of arrangement; that the contract was upon its true construction one of insurance against a certain event, viz., the bank's default, and, that event having happened, the defendants were liable to pay the sum insured, but would be entitled, the contract being one of indemnity, upon payment, to be subrogated to the rights of the plaintiff under the scheme of arrangement; and that, whether the contract was one of suretyship or one of insurance, the scheme of arrangement, which operated to discharge the bank under the statute and not by way of accord and satisfaction, did not defeat the right which had vested in the plaintiff under the contract upon the default made by the bank (i).

(h) [1894] 1 Q. B. 54.

v. *Pound* (1895), 64 L. J. Q. B. 394;

(i) Cf. *Mortgage Insurance Corporation*

Walton v. Cook (1888), 40 Ch. D. 325.

Release of Co-Surety.

The release of one of two or more co-sureties, if it injuriously affects the right of the other surety or sureties to contribution, will have the effect of discharging the latter (*k*).

In *Mercantile Bank of Sydney v. Taylor* (*l*), which was a suit against one of five joint and several sureties to recover the amount guaranteed, it appeared that the plaintiff had, without the defendant's knowledge and consent, released another of the sureties "from all debts due by him to the bank at this date." It was held that the plaintiff could not recover, and that the legal effect of the release could not be modified by evidence of verbal negotiations prior to the release, for the purpose of showing an agreement to reserve rights against the sureties.

But where two or more sureties contract severally the creditor does not break the contract with one of them by releasing the other. The contract remaining entire, the surety in order to escape liability must show an existing right to contribution from his co-surety which has been taken away or injuriously affected by his release.

So, in *Ward v. National Bank of New Zealand* (*m*), it was held, in an action upon a guarantee, that a plea to the effect that M. was the defendant's co-surety, and had been released in consideration of a new guarantee given to the plaintiff, constituted no defence: the plea nowhere averring or implying that the liability was joint, or that the defendant became surety on the faith of M.'s co-suretyship, or that any right of contribution had arisen against M. which had been taken away or injuriously affected, or that the defendant had suffered any damage or injury by the substitution described.

Agreement to give Time for Payment.

If the creditor, subsequently to the date of the contract of suretyship, enters into a binding contract with the principal debtor to give him time to pay the debt, without the consent of the surety and without stipulating that the surety shall not be thereby discharged, the surety will be released.

(*k*) Per Lord Eldon in *Mayhew v. Crickett* (1818), 2 Swans. 186, at pp. 192, 193. See also *In re E. W. A.*, [1901] 2 K. B. 642, where one co-surety had been released after judgment had been

obtained against himself and another jointly and severally.

(*l*) [1893] A. C. 317.

(*m*) (1883), 8 A. C. 755.

This rule extends to the case where the creditor only ascertains the existence of the relation of surety and principal debtor, as between two persons who are both liable to himself, subsequently to that liability being incurred; and even to the case where, as between the two persons liable to him, the relationship of surety and principal debtor is not created until after they become liable to him.

In *Overend, Gurney & Co. v. Oriental Financial Corporation* (*n*) two persons had appeared to the creditor, at the time the contract was entered into, to be both principal debtors. He afterwards obtained notice of the fact that one of them was a surety only. It was held that, when once he had received that notice, he could not give time to the one who, as between themselves, was the principal debtor, without discharging the surety.

In *Rouse v. Bradford Banking Co.* (*o*) it was further decided that where two or more persons are bound as principals, and it is afterwards agreed between them that, as between themselves, one shall be a surety only, and this agreement is made known to the creditor, the rule as to the discharge of a surety by giving time to the principal debtor applies.

Mere forbearance on the part of the creditor to sue the principal debtor will not release the surety. The fact of his remaining inactive is not enough to enable the surety to say that time has been given to the principal debtor, and that therefore he is discharged (*p*).

In order that the giving of time by a creditor to his principal debtor without the consent of a surety for the debt may have the effect of releasing the surety, there must be a binding contract to give time capable of being enforced, and the contract must be with the principal debtor. If the contract is made with a third party, for instance with a co-surety, the surety will not be released (*q*).

(*n*) (1874), 7 E. & I. A. 348. The statement of the case in the text is taken from Lord Herschell's speech in *Rouse v. Bradford Banking Co.*, [1894] A. C. 586, at p. 592.

(*o*) See last note.

(*p*) *Strong v. Foster* (1855), 17 C. B. 201. See also *York City and County Bank-*

ing Co. v. Bainbridge (1881), 43 L. T. 732, which seems, however, of doubtful authority.

(*q*) *Clarke v. Birley* (1889), 41 Ch. D. 422; *Frazer v. Jordan* (1858), 8 E. & B. 302. Cf. *Greenwood v. Francis*, [1899] 1 Q. B. 312, as to an agreement by one of several co-sureties to give time to the principal debtor.

Where the principal contract is divisible, the surety will not necessarily be discharged as to all the instalments or other periodical payments by the creditor giving time as to one of them (*r*).

In *Rouse v. Bradford Banking Co.* (*s*) the plaintiff and three other persons were partners, and jointly and severally liable to a bank for a large overdrawn balance. The plaintiff retired from the business, which was thenceforth carried on by the other partners. The plaintiff assigned his share to the other three, and they covenanted to pay all the debts of the firm, and indemnify him against them: provided always, that he should not be entitled to require them to pay any of the debts so long as he was kept indemnified against all claims in respect of them. The bank were aware of the terms of this agreement. The new firm opened a new account with the bank; but the old debt was kept separate, the bank charging the new firm compound interest on it, and allowing them interest on their new account. On the 16th of February, 1889, the balance then due being 50,000*l.*, the new firm applied to the bank for an increase of their overdraft to 53,000*l.* till the 14th of March, and this application was granted for valuable consideration. The new firm afterwards executed a deed for the benefit of their creditors under which the bank received a dividend, and then made a claim for the balance of the old debt against the plaintiff. It was held that there was, under the circumstances, no agreement to give time to the new firm or to alter the relation between the parties, and that the respondents had not released the appellant.

"I am not prepared," said Lord Watson, "to affirm, upon the evidence before me, that the bank twice gave time to their debtors. In my opinion, all that they did on the first occasion was to substitute a wider for a narrower limit of overdraft during a specified period. But, save as to its amount, the overdraft was to remain in all respects the same as before. The terms upon which the balance due was recoverable underwent no alteration. On the second occasion there is still less ground for suggesting that time was given."

(*r*) *Bingham v. Corbitt* (1864), 34 L. J. L. J. C. P. 157.

Q. B. 37; *Croydon Commercial Gas Co. v. Dickinson* (1876), 2 C. P. D. 46; 46

(*s*) See p. 688, *supra*, where this case is cited upon another point.

The question whether, supposing that there had been a giving of time in the above case, the proviso to the covenant of indemnity in the deed would have prevented the ordinary result of a giving of time from following, was not decided (*t*).

What amounts to Giving Time.—In *Howell v. Jones* (*u*) B., in January, 1825, gave the following guarantee to A., a banker: "Please to open an account with, and honour the cheques of, C. on Mill Account, for whom I will be responsible." The account was accordingly opened, and advances were made by A. It appeared to be the mode of dealing at the bank for the customers to give acceptances occasionally for the balance of their accounts. In February, 1827, A. ceased to make advances. In October, 1827, a payment into the bank was made by B. In February, 1828 (and not before), A. took B.'s acceptance at three months for the amount of his balance. It did not appear that B. had actual knowledge of the course of business at the bank, although he was solicitor to the bankers. It was held that taking the acceptance was a giving of time to the debtor, and that B., the surety, was thereby discharged.

So taking interest from the principal debtor by anticipation amounts to giving him time, and, accordingly, discharges the surety (*x*).

A creditor who holds a floating guarantee from a surety cannot, without the surety's consent, give time to the principal debtor as to a portion of the debt, without reserving the creditor's rights against the surety, and yet hold the surety liable for that portion.

In *Davies v. Stainbank* (*y*) indorseees of bills of exchange as a security for a floating balance due on the accounts between them and the drawer had notice that the acceptor was a surety for the drawer. They afterwards entered into an agreement with the latter that the existing debt should be liquidated by the drawer building for them certain ships, and should, in the meantime, be

(*t*) See per Lindley, L. J., [1894] 2 Ch. 32, at p. 57; Lord Herschell and Lord Watson, [1894] A. C. at pp. 593, 599.

(*u*) (1834), 1 C. M. & R. 97.

(*x*) *Blake v. White* (1835), 1 Y. & C. Ex. 420.

(*y*) (1855), 6 De G. M. & G. 679.

secured by a policy of assurance. It was held that time was thus given to the principal debtor, and that the surety was released.

So where a bank, as holder of bills, refrained from presenting them at maturity, at the request of the drawees, it was held that the drawer was released (z).

In *Liquidators of Overend, Gurney & Co. v. Liquidators of Oriental Financial Corporation* (a) McH. brought to O. and G. (a discount company) certain bills, which bore on them the acceptances of the F. Co. McH. was in fact the agent of the A. and G. W. Co. (an American company), and he and this American company had obtained the acceptances for their own accommodation, and on payment of a commission in respect of such acceptances. The bills were not paid, but renewed. McH. gave the O. and G. Co. his own guarantee and that of the American company that these renewed bills should be paid at maturity. These renewed bills were not paid. The O. and G. Co. gave, on the 6th of April, 1866, notice of dishonour to all the parties whose names were on the bills. On the 9th of April the solicitor of the F. Co. gave full information to the O. and G. Co. that McH. was the real principal on the bills, and that they had been accepted by the F. Co. merely for his accommodation. The manager of the O. and G. Co. said he should see McH. in the afternoon. McH. afterwards gave, as collateral security, to the O. and G. Co. bills to a much larger amount, drawn on one L. L., and the O. and G. Co. entered into an arrangement with McH. not to sue on the old bills if the bills on L. L. should be paid. Nothing further was done in the matter for some months. These last bills were not paid, and the O. and G. Co. afterwards brought an action against the F. Co. to recover the amount of the bills originally accepted by the F. Co. The F. Co. filed a bill to restrain the action. It was held that, under all the circumstances, the action must be restrained, as the O. and G. Co., with a knowledge of the real character of the F. Co.'s acceptances, had given time to McH., whom they knew to be the real principal on the bills, and had so discharged the F. Co. The mere giving of additional security by a principal will not,

(z) *Latham v. Chartered Bank of India* (1874), 17 Eq. 205. See also *Bolton v. Buckenham*, [1891] 1 Q. B. 278; *Bolton v. Salmon*, [1891] 2 Ch. 48.

(a) (1874), 7 E. & I. A. 348.

it was laid down, discharge a surety, but if the giving of such security is really a consideration for giving time to the principal it will do so. The view was also expressed that, in order to reserve a creditor's right against a surety, there must be a distinct expression of intention to reserve it.

Credit under Original Contract.—In *Simpson v. Manley* (b) a guarantee was in the following terms: "May 26th, 1830. Our relation Mr. Thomas Manley, having intimated to us that he is about to make some purchases of goods from you, we beg to say, that if you give him credit, we will be responsible that his payments shall be regularly made to the extent of one thousand pounds, from this period to the 1st of June, 1831."

Thomas Manley proved that he, before the guarantee, had dealt with the plaintiffs at a credit of seventy-three days; and that, after the guarantee, wishing to extend the credit as much as he could, he proposed to the plaintiffs, and they agreed, that he should have credit until the Saturday following the seventy-third day. It appeared that seventy-three days was not the exact credit which was customary in the trade. The defendants were not mercantile men, and were not cognizant of the terms of the prior dealings between Thomas Manley and the plaintiffs. A verdict passed for the plaintiffs for 1,000*l.*, with liberty for the defendants to move to enter a nonsuit.

The Court of Exchequer refused a rule, Bayley, B., saying: "This is purely a question on the construction of the instrument. There is nothing in the words of the guarantee as to any particular terms of credit, but the language is, if you give him credit, not the usual credit, but credit generally, which means if you trust him. It is not to be a dealing on the terms of the trade, but on the terms to be settled between the parties. It must be a fair and reasonable credit, or it might operate as a fraud upon the sureties. The fallacy arises from the use of the word credit. If, after the time for payment has elapsed, you give credit to the principal, you discharge the surety. Here there was no credit given in that sense, but the meaning of the contract was, that the plaintiffs should be

(b) (1831), 2 C. & J. 12.

paid according to the terms upon which they and the principal should deal" (c).

Assent of Surety.—The surety will not, of course, be discharged if he assents to the giving of time.

In *Torrance v. Bank of British North America* (d) A. drew a bill on B., which B. accepted. The bank became the holder for value. Before the due date it was agreed between A. and the bank (A. assuring the bank of B.'s concurrence) that the bill should be renewed; and the bank gave to A. a cheque on the bank for the amount of the bill, to the intent that B. should be placed in funds to meet the original bill, and should thereupon accept the renewed bill. A. sent the new bill to B. for acceptance, and also sent him the cheque, and B. knew the purposes for which both were sent. B. cashed the cheque and paid the first bill, but refused to accept the second. It was held that B. had no right so to appropriate the cheque without accepting the bill, and that the agreement between A. and the bank did not release B. from his suretyship as acceptor of the first bill.

Lord Justice Mellish, in delivering the judgment of the Judicial Committee of the Privy Council, said: "It is very difficult to say how a surety's position can be altered, because the two parties say, 'We offer to you to postpone your payment for three months if you like to accept it; you may either accept or reject it; but we offer to you, if you please, to postpone your liability to pay us for three months.' It appears to their Lordships that that did no harm to the surety and could not have the effect of discharging him."

Reservation of Rights against Surety.—Where the creditor, while agreeing to give time to the debtor, expressly reserves his remedies against the surety, the latter will not be discharged (e); even although the reservation is not communicated to the surety (f).

(c) Cf. *Combe v. Woolf* (1832), 8 Bing. 156; 1 M. & Sc. 241; *Manley v. Boycot* (1853), 2 Ell. & Bl. 46; *Samuell v. Howarth* (1817), 3 Mer. 272.

(d) (1873), L. R. 5 P. C. 246.

(e) Per Parke, B., in *Kearsley v. Cole* (1846), 16 M. & W. 128; *Cragoe v. Jones*

(1873), L. R. 8 Ex. 81, at p. 86; *Webb v. Hewitt* (1857), 3 K. & J. 438 (this case was explained in *Green v. Wynn* (1869), 4 Ch. 204, cited in note (d), on p. 685, *supra*).

(f) *Webb v. Hewitt*, cited in last note; *Kearsley v. Cole*, *ibid*.

Giving Time to Surety.—If the creditor agrees with the principal debtor to give time to the surety, the latter is thereby discharged (*g*). But it is otherwise if the creditor makes such an agreement with the surety himself (*h*).

Loss of Securities by Creditor.

If, through any neglect or improper dealing on the part of the creditor, a security to the benefit of which a surety is entitled is lost, or is not properly perfected, the surety is released *pro tanto* (*i*).

A surety has, moreover, the right to insist that a security given by a co-surety shall not be wasted (*k*).

In *Taylor v. Bank of New South Wales* (*l*) the appellants, having become sureties on the faith of a mortgage granted by the principal debtor to his creditor, claimed to be released wholly or *pro tanto* from liability, on the ground that the creditor had without notice to them sold parts of the mortgaged property in a manner unwarranted by the terms of the mortgage deed, and that, inasmuch as the purchaser had failed to pay the price, they had been deprived of the benefit of a security upon which they were entitled to rely for protection. It was held that on the evidence the sale was effected by the mortgagor, although with the previous consent of the mortgagee, in the due course of his management and in a manner contemplated by the mortgage deed, and that the liability of the sureties was not affected thereby (*m*).

Lord Watson, delivering the judgment of the Judicial Committee, said: "Even if it had been shown that the benefit of the price of these 2,500 sheep was lost to the sureties through the act of the bank, the appellants would not have been thereby discharged from all liability. In that event, the present case would not have

(*g*) *Liquidators of Overend, Gurney & Co. v. Liquidators of Oriental Financial Corporation* (1874), 7 E. & I. A. 348.

(*h*) *Defries v. Smith* (1862), 10 W. R. 189.

(*i*) *Strange v. Fooks* (1863), 4 Giff. 408; 8 L. T. N. S. 789; *Pearl v. Deacon* (1857), 1 De G. & J. 461; 24 Beav. 186; *Wulff v. Jay* (1872), L. R. 7 Q. B. 756; per Sir Robert Collier in *Ward v. National*

Bank of New Zealand (1883), 8 A. C. 755, at p. 766. Cf. *In re Russell, Russell v. Shoolbred* (1885), 29 Ch. D. 254, and *Wheatley v. Bastow* (1855), 7 De G. M. & G. 261.

(*k*) *Margrett v. Gregory* (1862), 10 W. R. 630; 6 L. T. 543.

(*l*) (1886), 11 A. C. 596.

(*m*) See also *Price v. Kirkham* (1864), 3 H. & C. 437.

been within the principle of *Polak v. Everett* (*n*) and *Holme v. Brunskill* (*o*), which were relied on in the argument for the appellants. In both these cases there had been an alteration of the original contract between the creditor and the principal debtor, without the consent of the surety, who was held to be wholly discharged, on the plain ground that he could not be made liable for default in the performance of a contract which he had not guaranteed. The present case would, in such event, have been within the rule of *Pearl v. Deacon* (*p*), where the creditor had, by his own act, rendered unavailable part of the security, to the benefit of which the surety was entitled, and the latter was held to be discharged, not absolutely, but only *pro tanto*” (*q*).

Surrender of Security in Bankruptcy.—“A secured creditor is not to be deprived of the exercise of the option which is given to him by the Bankruptcy Act, or prevented from adopting that course in relation to his security which is most beneficial to himself, simply because there happens to be a surety for the payment of his debt; for I think it must be taken that where three persons enter into the relations of creditor, debtor, and surety, the possible bankruptcy of the debtor is an event which the surety has in his contemplation at the time of entering into the contract of suretyship, and that consequently it becomes an implied term of that contract that, in the event of the bankruptcy occurring, the creditor shall be entitled to exercise that option which the bankruptcy law gives him in the way which is most advantageous to himself.”

Lord Justice Baggallay made the foregoing remarks in *Rainbow v. Juggins* (*r*). There the defendant became surety for the repayment of a sum of money advanced by the plaintiff to P. Under the terms of the contract of suretyship, P. deposited with the

(*n*) (1876), 1 Q. B. D. 669.

(*o*) (1878), 3 Q. B. D. 495.

(*p*) (1857), 24 Beav. 186; 1 De G. & J. 461.

(*q*) See also *Wilkinson v. London and County Banking Co.* (1884), 1 T. L. R. 63. There a guarantee had been given to secure the general balance of a customer's account, and, subsequently, a

succession of advances had been made to him against securities deposited by him in respect of each advance. It was held that the guarantee had not been discharged by the fact of these securities having been given up by the bank, without the surety's consent, upon the repayment of the advances.

(*r*) (1880), 5 Q. B. D. 422, at pp. 424-5.

plaintiff a policy of insurance on his life by way of collateral security. P. failed to pay the premiums on the policy, which in consequence lapsed. Subsequently to the expiry of the policy, P. became bankrupt, and the plaintiff proved against P.'s estate for the whole amount of the debt due to her, without putting any value on the policy, which was consequently ordered by the Court of Bankruptcy to be delivered up to the trustee. The question was whether the plaintiff, by adopting that course, had discharged the defendant from his liability as surety. It was held that she had not, and for two reasons: first, that the defendant's position had not been altered by the surrender of the policy to the trustee, for, having lapsed, it was a mere piece of waste paper of no marketable value whatever; and, secondly, that even assuming it had some value, and could, therefore, be said to be a security, the plaintiff was none the less entitled to exercise the option, given by the Bankruptcy Act, of surrendering the security to the trustee and proving for the whole debt because there happened to be a surety for the payment of that debt.

"The plaintiff," said Lord Justice Bramwell, "was entitled to prove for the full amount of her debt if she thought it best for her own protection to do so, and if the law is, as undoubtedly it is, that she could not so prove without surrendering the policy to the trustee (assuming it to be of some value), then the bargain of the surety must be taken to have been made subject to the liability of the policy being surrendered to the trustee in the event of the bankruptcy of the principal debtor. And in such a case I think the utmost the surety would be entitled to say would be, 'You must make me some allowance for the loss which has been occasioned to me by the way in which you have availed yourself of your rights.' If there were no bankruptcy, probably the creditor would not have a right to sell the policy; I should imagine that all he could do would be to keep the policy on foot himself. But in the case of bankruptcy, he would have a right to give up the policy and call upon the surety for the difference."

Securities against Discount of Bills.—It has been seen (r) that, generally speaking, the indorser of a bill which is no longer cur-

(r) At p. 664, *supra*.

rent (*s*) is a surety for its payment to the holder, and that, having paid it, he is entitled to the benefit of any securities deposited to cover it with the holder by the acceptor.

But while the bill is current he is not in all respects in the same position as an ordinary surety, and the banker who holds the bill may vary the securities received from the customer who has accepted it, according to the ordinary course of his dealings with that customer, as long as he remains solvent and the acceptance has not been dishonoured.

"I think," said Lord Chancellor Selborne in *Duncan, Fox & Co. v. North and South Wales Bank* (*t*), "that the principles deducible from all the authorities lead, necessarily, to the conclusion that, under circumstances like the present, the equity between the indorser and the acceptor is the same as that between a surety and a principal debtor when the creditor is not a party to the contract of suretyship. That equity, according to my view of it, need not interfere with the ordinary operation of such a general covering security as that given by Samuel Collins Radford to the North and South Wales Bank, during the continuance of the dealings between the secured creditor and the acceptor of bills not overdue (*u*), which the creditor may hold or part with as he pleases. It will not incapacitate bankers who may hold such a bill, accepted by a customer and indorsed by a third party, from carrying on their dealings with that customer, by varying the securities received from him according to the ordinary course of those dealings, as long as he remains solvent and before the acceptance has been dishonoured. It will not, in my opinion, tend to paralyse the business of discounting bills of exchange. But it is an equity which, in my judgment, does certainly attach when the bills, overdue and dishonoured, and the securities, are found together in the hands of the secured creditor, at the time when he requires payment from the indorser; when the creditor has no other transactions then depending with the customer, and no claim upon the securities except for

(*s*) See per Lord Watson in *Duncan, Fox & Co. v. North and South Wales Bank*, cited at p. 664, *supra*, at pp. 22-3 of the report.

(*t*) At p. 15 of the report referred to at p. 664, *supra*.

(*u*) Cf. Lord Watson's remarks at the foot of p. 22 and the top of p. 23 of the report.

the bills themselves; and when the competition is between the indorser and the acceptor only."

Statute of Limitations.

In the case of a guarantee not under seal, the creditor's right against the surety will be barred in six years after the date at which an action could have been brought by the creditor against him (*x*). In the case of a guarantee under seal the period of limitation is twenty years (*y*), unless it is in respect of a debt secured by a mortgage of land, when it is twelve years, whether the covenant of the surety is contained in the mortgage deed itself or in a collateral bond (*z*), though in this case a payment of interest by the mortgagor to the mortgagee will prevent the right of action against the surety being barred in the shorter period (*a*).

Although, where there is a present debt, and a covenant or promise to pay on demand, the demand is not considered a condition precedent to bringing the action, yet where there is a covenant or promise to pay a collateral sum on demand, as in the case of a covenant by a surety for the principal debtor, then a request must be made before an action is commenced, or before the money can be considered as owing by the collateral debtor. Accordingly, the statute will not begin to run in such a case until a demand is made (*b*).

So where a promissory note expressed to be payable on demand had been given to a banker, together with a memorandum stating that the note was given as security for the banking account of a customer, and that the banker was to be at liberty at any time thereafter to recover from the maker, up to the full amount of the note, every sum in which the customer should thereafter be indebted for moneys paid or advanced by the banker to him, it was held that the statute did not begin to run until the bank had made a claim against the surety (*c*).

(*x*) 21 Jac. 1, c. 16.

(*y*) 3 & 4 Will. 4, c. 42, s. 3.

(*z*) Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 8; *Sutton v. Sutton* (1882), 22 Ch. D. 511; *Fearnside v. Flint* (1882), 22 Ch. D. 579; *In re Powers, Lindsell v. Phillips* (1885),

30 Ch. D. 291.

(*a*) *In re Frisby, Allison v. Frisby* (1889), 43 Ch. D. 106.

(*b*) *In re J. Brown's Estate, Brown v. Brown*, [1893] 2 Ch. 300.

(*c*) *Hartland v. Jukes* (1863), 1 H. & C. 667; 32 L. J. Ex. 162; 9 Jur. N. S.

On the other hand, in *Parr's Banking Company v. Yates (d)*, which was an action on a guarantee, it appeared that the defendant had guaranteed to the plaintiffs, a banking company, payment of all moneys which might be owing to them in account with a customer with interest, commission, and other banking charges; and it was provided that the guarantee should be a continuing guarantee, and should not be withdrawn except by six months' written notice from the guarantor. The plaintiffs made advances to the customer by honouring his overdrafts from time to time down to a period more than six years before the action, but made no advances subsequently to that period, and the customer paid sums into his account with the bank against his liability from time to time down to a period within six years before the action. At the end of each half-year the plaintiffs debited him in account with the interest for the half-year on the amount owing by him from time to time, and carried forward the balance to his debit as the amount owing at the commencement of the next half-year. It was held that the plaintiffs' right of action upon the guarantee in respect of the sums advanced by them to the customer was barred by the Statute of Limitations, but that the action was maintainable in respect of interest which had accrued due from the customer within six years before the action and had not been paid, as the rule with regard to the appropriation of payments by which interest is presumed to be paid before principal is not applicable in the case of interest on an overdrawn account which, according to the practice of bankers, has been from time to time converted into principal.

"I think," said A. L. Smith, L. J., "that, upon the true construction of it, no advances having been made for a period of more than six years before the date of the writ in the action, the plaintiffs' right of action in respect of the advances is barred by the Statute of Limitations. That, however, does not dispose of the case, because the guarantee was given, not only in respect of sums advanced to the guaranteed party, but also in respect of interest, commission, and other banking charges. In my opinion, as interest, commission, and other banking charges, the payment of

180. See also *Colvin v. Buckle* (1841), 8 68 L. T. 405.
M. & W. 680; *Henton v. Paddison* (1893), (d) [1898] 2 Q. B. 460.

which is as much guaranteed by the guarantee as the payment of the advances, have accrued against the guaranteed party within the period of six years before the commencement of the action, the Statute of Limitations does not affect those items, and the plaintiffs are entitled to recover such interest, commission, and other banking charges as they can show to have become due from the guaranteed party to them during that period, that is between September 3, 1891, and September 3, 1897. The doctrine that interest is an accessory which falls to the ground with the principal does not apply to a case like this, because the payment of interest, commission, and other banking charges due from the guaranteed party is as much guaranteed as payment of the sums advanced themselves. I do not think that the doctrine with regard to the appropriation of payments to interest before principal, upon which the defendant relied, has any application to the present case."

Right of Surety to Contribution.—The statute does not begin to run against a surety suing a co-surety for contribution until the liability of the surety is ascertained—that is to say, until the claim of the principal creditor has been established against him, although at the time of the action for contribution the statute may have run as between the principal creditor and the co-surety (*e*).

(*e*) *Wolmershausen v. Gullick*, [1893] 2 Ch. 514.

CHAPTER VI.

LIEN.

By implication of law a banker has a lien upon all negotiable securities and moneys placed by a customer in his hands as banker, if and so long as the customer is indebted to him, either in respect of an overdrawn current account or of acceptances on account of the customer which exceed the amount of his cash balance, unless there be an express contract or circumstances that show an implied contract inconsistent with this lien (*a*).

This general lien is part of the law merchant which Courts of justice are bound to know and recognize (*a*).

But a banker who has discounted bills for a customer has no implied lien on that customer's cash balance during the currency of the bills (*b*). "It would be quite contrary," said Brett, J., "to the regular course of such advances. A customer asks for discount in order to increase his drawing account. Then it is said the banker has a lien on the cash balance: if that were the case there would be no use in discounting the bills" (*c*).

PROPERTY SUBJECT TO THE LIEN.

Negotiable Instruments (d).

The lien clearly attaches to negotiable instruments, whether belonging to the customer or not, provided that, in the latter case, the banker has received them in good faith.

(*a*) Per Lord Campbell in *Brandao v. Barnett* (1846), 12 Cl. & F. 787, at p. 806, cited with approval by Sir Robert P. Collier, delivering the judgment of the Judicial Committee of the Privy Council in *London Chartered Bank of Australia v. White* (1879), 4 A. C. 413, at p. 422; per James, L. J., in *In re United Service Co., Johnston's Claim* (1871), 6 Ch. 212, at p. 217; *Marten v. Roake, Eyton & Co.* (1885), 53 L. T. 946. Cf. *Leese v.*

Martin, cited at p. 709, *infra*.

(*b*) *Bower v. Foreign and Colonial Gas Co., Metropolitan Bank, Garnishees* (1874), 22 W. R. 740.

(*c*) See also pp. 598—602, *supra*; and cf. *Davis v. Bowsher* (1794), 5 T. R. 488, — *Agra and Masterman's Bank v. Hoffman* (1864), 34 L. J. Ch. 285, cannot be regarded as an authority on this point.

(*d*) As to these, see Chap. 7, Sect. 4, *infra*.

"The holder of negotiable securities," said Lord Campbell in *Brandao v. Barnett* (e), "is to be assumed to be the owner, and third parties acting *bonâ fide* may treat with him as owner. . . . The right acquired by a general lien is an implied pledge, and where it would arise (supposing the securities to be the property of the apparent owner) I think it equally exists if the party claiming it has acted with good faith, although the subject of that lien should turn out to be the property of a stranger."

So, where bonds payable to bearer, and passing by delivery only, were deposited with bankers for safe custody, and the bankers afterwards fraudulently deposited them with their brokers as a security for money advanced, and became bankrupt, it was held that the bonds were subject to the general lien of the brokers for all money advanced by them to the bankers, and not merely for the advance made upon the security of the particular bonds (f).

In *Misa v. Currie* (g) Lord Hatherley, in the course of his speech, said: "I should be prepared to hold that in this case, according to the decision which has been so frequently referred to in the case of *Brandao v. Barnett* (h), the custom of bankers is now perfectly well established, and must be known to every mercantile person in the city of London. Mr. Misa, like others, is bound by his knowledge of that custom. Of course he must have been perfectly well aware that all moneys paid into a bank are subject to a lien, and that all documents as well as moneys deposited with a banker may be subject, on the banker's part, to a lien in respect of any balance that may be due to him from his customer. When Misa's agent paid in this cheque due to Lizardi he was aware that it was going into Glyn's Bank; the very document he got in exchange for it informed him of that fact. In truth, Lizardi being at that time in a position in which he himself could have demanded the money, executes this negotiable instrument, with every intent, as Misa knew, of paying it into his

(e) At pp. 805-6.

(f) *Jones v. Peppercorne* (1858), 28 L. J. Ch. 158; 5 Jur. N.S. 140; Johnson, 430. Cf. *In re Bowes, Earl of Strathmore v. Vane*, cited at p. 710, *infra*.

(g) (1876), 1 A. C. 554, at p. 569.

For the facts of this case, see p. 294, *supra*.

(h) See p. 706, *infra*.

bankers, and giving the bankers that lien which the case I have referred to decided that they had upon all documents of this kind which came into their hands."

Cash.

It is often stated that the lien attaches to money (*i*) ; but inasmuch as, quite apart from any question of lien, a banker is only bound to pay to, or to the order of, his customer the amount of the balance due to the latter after deducting what is due to the banker himself from the customer, the lien will not normally have any effective application to moneys (*k*).

Indeed, as is well said in the treatise of Mr. Morse on the American law of banking (*l*), "The word 'lien' cannot properly be used in reference to the claim of the bank upon a general deposit, for the funds on general deposit are the property of the bank itself. The term 'set-off' should be applied in such cases, and 'lien' when a claim against paper or valuables on special or specific deposit is referred to. In the cases the words are used very loosely, and sometimes the true force of a case has been mistaken by text-writers through failure to keep in mind this distinction. The practical effect of lien and set-off is much the same. They result in balancing opposing claims, and since transfers of a general deposit are subject to the equities between the bank and the depositor, until notice to the bank, its right of set-off is as good in respect to a general deposit as its lien in respect to a specific deposit for collection or as collateral" (*m*).

Where a firm had an account at a bank and a partner had a separate account at the same bank, it was held that the banker had no lien upon the balance due to the partner upon his separate account for a balance due to the banker from the firm (*n*).

(*i*) See the observations of Lord Hatherley, cited immediately above.

(*k*) See *Roxburghe v. Cox* (1881), 17 Ch. D. 520.

(*l*) (Boston), 4th ed. p. 596.

(*m*) In *Fourth National Bank v. City*

National Bank (1873), 68 Illinois, 398, it was held that the banker's lien is confined to securities and valuables, and does not extend to the balance on a drawing account.

(*n*) *Watts v. Christie* (1849), 11 Beav. 546.

Other Property.

Whether the lien extends to any other classes of property is doubtful.

"The cases," said Kindersley, V.-C., in *Wylde v. Radford* (o), "refer to a deposit of documents which are in their nature securities; but there is some ambiguity in the term 'securities.' Anything may, of course, be deposited, and deeds or plate after they have been deposited may be said to be a security, but what is intended is such securities as promissory notes, bills of exchange, exchequer bills, coupons, bonds of foreign governments, &c.; and the Courts have held that if such securities are deposited by a customer with his banker, and there is nothing to show the intention of such deposit one way or the other, the banker has, by custom, a lien thereon for the balance due from the customer" (p).

As to the subject of lien upon the shares of one who is both a debtor to and a member of a banking company, reference should be made to pp. 36—38, above.

EFFECT OF THE LIEN.

It is in the nature of a possessory lien that it carries the right of detaining whatever is subject to it. Accordingly, the customer cannot insist upon taking any securities subject to the lien out of the hands of his banker so long as a balance is due to the latter (q).

But this lien carries with it the further right of realizing the security, and of suing any of the parties liable upon a dishonoured

(o) (1863), 33 L. J. Ch. 51, at p. 53.

(p) The language of Bacon, C. J., in *In re Trethowan, Ex parte Tweedy* (1877), 5 Ch. D. 559, at p. 565, is to the opposite effect; but in this case there was an express charging of the title-deeds in question, and *Wylde v. Radford* does not appear to have been referred to. There is not therefore any necessary, and probably there was no intentional, conflict between the judgments in the two cases. See also *Lucas v. Dorrien*, cited at p. 708, *infra*, and *In re Bowes, Earl*

of Strathmore v. Vane, cited at p. 710, *infra*. As to certificates of shares on which the banker collects the dividends, see the judgment of James, L. J., in *In re United Service Co., Johnston's Claim*, cited at p. 565, *supra*; and as to plate chests, the judgment of Lord Campbell in *Brandao v. Barnett*, cited at p. 564, *supra*. As to deposit for safe custody generally, see pp. 562—572, *infra*.

(q) *Davis v. Bowsher* (1794), 5 T. R. 488, and cases on lien generally.

bill. In this respect the rights of the banker resemble those of a pawnee (*r*). The fact that negotiable instruments are the principal, if not in reality the only, things subject to it, probably explains this extension of the ordinary effect of a lien: as otherwise their value might be seriously diminished or even destroyed.

The banker is deemed to be a holder for value of a bill to the extent of the sum for which he has a lien on it (*s*).

Lapse of Time.

The Statutes of Limitation only bar the remedy by action upon contracts: they leave other securities for debts, including liens, unaffected.

“Though the Statute of Limitations has run against a demand, if the creditor obtains possession of goods on which he has a lien for a general balance, he may hold them for that demand by virtue of the lien” (*t*). Accordingly the banker’s lien will cover debts which were statute-barred before he obtained possession of the securities subject to the lien (*u*).

Abandonment of Lien.

Apparently a lien may, in effect, be abandoned.

In *Ex parte Douglas, In re Noble* (*x*), a debenture for a tontine annuity was deposited by an intestate with his bankers, one of whom received the dividends, and placed them to the credit of the intestate’s account. The intestate died in 1801, and a commission issued against the bankers in 1810. Notwithstanding this, the same partner continued to receive the dividends and pay them to the intestate’s widow up to the period of his own death, which happened in 1822; some time after which the assignees of the bankers claimed a lien on the debentures for a debt due from the intestate to the banking-house. It was held that a claim to lien could not under these circumstances be maintained.

(*r*) See *Donald v. Suckling* (1866), (1800), 3 Esp. 81.
L. R. 1 Q. B. 585; Smith’s Merc. Law, 10th ed. p. 697, note (*a*).

(*s*) Bills of Exchange Act, s. 27 (3).
Cf. *Scott v. Franklin* (1812), 15 East, 428.

(*t*) Per Lord Eldon in *Spears v. Hartly*

(*u*) *Spears v. Hartly*, cited in last note; *In re Broomhead* (1847), 5 D. & L. 52; 16 L. J. Q. B. 355; *In re Carter* (1885), 55 L. J. Ch. 230.

(*x*) (1833), 3 Deac. & Ch. 310.

EXCLUSION OF LIEN.

The lien can of course be excluded by express contract. This requires no detailed or special consideration : the general principle of law being, *Expressum facit cessare tacitum*.

It may also be excluded where the circumstances of the case give rise to the inference that the understanding between the banker and his customer was inconsistent with it.

Receipt for Inconsistent Purpose.

In *Brandao v. Barnett* (y) A. was the London agent of B., a Portuguese merchant, and in that character purchased exchequer bills for him, received interest on them, and, at proper intervals, got them exchanged for others. He acted in the same manner for several other foreign customers. A. kept an account with C. as his banker, and had several tin boxes at C.'s banking-house, in which he deposited the exchequer bills, and of which he kept the keys. On the 1st December, 1836, A. took out of a tin box several exchequer bills, which he delivered to C., requesting C. to get the interest due on them and to get them exchanged for others. C. did so. Before A., who had been ill for some time, came to get the exchequer bills, acceptances of his beyond the amount of his cash credit account were presented at C.'s bank and paid. A. afterwards became bankrupt, and C. claimed a lien on the exchequer bills so placed in his hands for the balance due on A.'s account. The House of Lords decided that no lien existed.

"The deposit in this instance," said Lord Lyndhurst, "was not such, under all the circumstances, as to give the banker a lien upon the exchequer bills ; they were deposited in a box, they were kept under lock and key, the key was not kept by the banker, but it was kept by the party, Mr. Burn. From time to time he called, for the purpose of taking the exchequer bills out of the box, in order that he might receive the interest upon them ; or if the bills were called in by the government, in order that they might be exchanged for others. He himself attended upon those occasions, took the bills out, and delivered them for that special purpose to the banker.

They were always returned almost immediately: the first time that he applied at the bank after a transaction of this kind, they were delivered to him, and were replaced under lock and key in the same place of deposit. It is impossible, considering how this business was carried on, that we can come to any other conclusion than this,—that it was an understanding between the parties that the new bills were to be returned after the interest was received, or after the old bills had been exchanged. If so,—if that was the understanding, or if that was the fair inference from the transaction,—it is quite clear that there could be no lien; that it does not come within the general rule; and what my noble and learned friend has stated, I think, is perfectly correct, that although from the accidental circumstance of the illness of Mr. Burn these particular bills happened to remain for a longer period in the hands of the bankers than was usual, that accidental circumstance alone will not vary the case, nor give the bankers a lien, if under other circumstances that lien would not attach” (z).

In *Bock v. Gorrisen* (a) a firm of merchants at Hamburg, in June, 1857, directed their correspondents, a firm of merchants in London, to purchase Mexican bonds, which passed by delivery, upon certain terms, the bonds, when purchased, to be held at the disposal of the Hamburg firm. On the 2nd July, the London firm wrote to announce that the bonds had been purchased, and enclosing the account of the transaction, the amount of which they said they would reimburse themselves on the following day. On the 3rd July, they wrote to apprise the Hamburg firm of bills drawn upon them for the amount, by which they “balanced the transaction.” On the 4th July, the Hamburg firm wrote to state that they would honour the drafts, advice of which they expected, and requesting the London firm, in the meanwhile, to keep the bonds in safe custody and to give the numbers of the same. On the 6th July, the London firm wrote to state that, until further order, they would retain the bonds for safe custody, and gave their numbers. The bills were accepted by the Hamburg firm, and, at maturity, were paid. On the 19th November, the Hamburg

(z) Cf. the judgment of James, L. J., in *In re United Service Co., Johnston's Claim*, cited at pp. 565—567, *supra*.

(a) (1860), 30 L. J. Ch. 39; 2 De G. F. & J. 434; 7 Jur. N. S. 81; 3 L. T. 424; 9 W. R. 209.

firm wrote to request that the bonds might be sent to them by post. On the same day, the London firm wrote to announce that they had stopped payment, but that the Mexican bonds lying with them were unjeopardized. The Hamburg firm afterwards stopped payment. In a suit by their representatives for the delivery of the bonds, it was held that they were not subject to a lien for the general balance of account between the two firms.

Lord Chancellor Campbell, assuming for the purposes of his judgment that the firms were factors or bankers, said: "Although parties carry on a trade or business in which a general lien is recognized, they cannot claim a general lien arising out of any transaction in which the goods or securities are by agreement held for a particular purpose or under special conditions, inconsistent with the claim of a general lien" (a).

Documents Inadvertently Left.

A banker will have no lien on muniments casually left in his bank after he has refused to advance money on them as a security.

In *Lucas v. Dorrien* (b) a customer, who was already indebted to his bankers for an advance in respect of which they held a certain security, applied for a further advance on the security of a lease, which the bankers declined to make. The customer, however, left the lease with them without making any declaration of the purpose with which it was so left. It remained in their possession, loose and unenclosed in any cover, down to, and after, the time when the customer became bankrupt. It was held that the bankers had no lien upon this lease. "The case," said Burrough, J., "states that the bankrupt applied to borrow money on it, which the defendants declined to lend; a court of equity, therefore, never would have deemed this a security for money. It was left in the defendants' banking-house by mistake, and the defendants' possession of it is explained" (c).

(a) See also *Stumore v. Campbell & Co.*, [1892] 1 Q. B. 314; and cf. *Symons v. Mulkern*, cited at p. 786, *infra*.

(b) (1817), 7 Taunt. 279.

(c) See p. 704, *supra*.

Deposit for Safe Custody.

In *Leese v. Martin* (d) bankers who, according to the usual custom in London between bankers and stockbrokers, made, upon the security of share certificates and other property deposited with them, advances to a stockbroker for specific purposes, were held by Hall, V.-C., not to have a general lien on boxes and their contents deposited with them for convenience and safe custody by the same stockbroker, he keeping the keys of, and having constant access to, the boxes, and the bankers (who were treated by the Vice-Chancellor as being mere gratuitous bailees (e)) not knowing, till after he had by inquisition been found lunatic, the contents of them. The committees of the lunatic were held entitled to have the boxes and their contents delivered up to them, notwithstanding that the bankers had obtained a judgment in an action for the payment of the balance due to them on the lunatic's banking account, and also certain charging and garnishee orders.

Receipt of Inconsistent Security.

"Lien is not the result of an express contract; it is given by implication of law. If, therefore, a mercantile relation, which might involve a lien, is created by a written contract, and security given for the result of the dealings in that relation, the express stipulation and agreement of the parties for security exclude lien, and limit their rights by the extent of the express contract that they have made. *Expressum facit cessare tacitum*. If a consignee takes an express security, it excludes general lien" (f).

"It is not the mere taking of a security which destroys the lien, but there must be something in the facts of the case, or in the nature of the security taken, which is inconsistent with the existence of the lien, and which is destructive of it" (g). Accordingly, to cite an illustration from a case decided with regard to an inn-keeper's lien, it was held that the acceptance of security from a

(d) (1873), 17 Eq. 224; 43 L. J. Ch. 193.

(e) See as to this pp. 562—571, *supra*.

(f) Per Lord Westbury, delivering the judgment of the Privy Council in

In re Leith's Estate, Chambers v. Davidson (1866), L. R. 1 P. C. 296, at p. 305.

(g) Per Kay, J., in *Angus v. McLachlan* (1883), 23 Ch. D. 330, at pp. 335-6.

guest for the payment of hotel charges did not exclude the innkeeper's lien upon the goods of the guest for the amount of such charges, there being nothing in the nature of the security (a letter charging a bill of sale on a ship with the payment of any account due or to become due to the innkeeper), or in the circumstances under which it was taken, which was inconsistent with the existence or continuance of the lien, and therefore destructive of it (*h*).

Security payable at Future Day.—"If a security is taken for the debt for which the party has a lien upon property of the debtor, such security being payable at a distant day, the lien is gone" (*i*).

Security restricted to Specified Property.—In *Wylde v. Radford* (*k*) a customer deposited with his bankers a deed of conveyance (*l*) including two distinct properties, giving to them at the same time a memorandum pledging one of the properties, as security for a specific sum advanced, and also for his general balance. It was held that, as the deposit of the deed of conveyance was for the special purpose of giving a security upon one property only, the bankers could claim no general lien, by the custom of bankers, on the other property.

Security restricted to Specified Amount of Debt.—In *In re Bowes, Earl of Strathmore v. Vane* (*m*), a customer had deposited a policy of life assurance with his bankers, accompanied by a memorandum of charge to secure overdrafts, not exceeding 4,000*l*., together with interest, commission and charges. Mr. Justice North held that the bankers' lien was displaced, and the charge limited to the amount specified.

"They claim," said his Lordship, "a right under the special contract in writing and also under an implied contract. It appears to me that that is inconsistent with the terms of the agreement, which is for a security for a sum not exceeding 4,000*l*. principal and no more, with interest and commission, and that when the

(*h*) *Angus v. McLachlan*, see last note. See also *In re Leith's Estate*, note (*f*) on p. 709, *supra*.

(*i*) Per Tindal, C. J., in *Hewison v. Guthrie* (1836), 3 Scott, 298, at p. 311; 2

Bing. N. C. 755, at p. 759. See also *Cowell v. Simpson* (1809), 16 Ves. 275.

(*k*) (1863), 33 L. J. Ch. 51.

(*l*) See p. 704, *supra*.

(*m*) (1886), 33 Ch. D. 586.

contract says in so many words that the charge is for a sum not exceeding 4,000*l.* the charge is limited to that amount. The case of *Jones v. Peppercorne* (*n*) was relied upon by Mr. Higgins as an authority that the general lien was to prevail. This case, however, seems to me much more like the case of *Wylde v. Radford* (*o*) before Vice-Chancellor Kindersley. *Jones v. Peppercorne* was a case in which securities had been pledged with brokers under circumstances which gave a right of sale, and the right of sale had been exercised. It was not suggested that the sale was wrong in any way: and it may well be that bankers who have a power of selling securities deposited, when they have sold, and have clear money in their hands after satisfying the charge, may be entitled to say they will set off that money against further sums due to them (*p*); but that seems to me a totally different case from the present, where the security is of a wholly different nature, and the bank had no power of sale. It is quite true that if, after a demand for payment had been made, the bank might have insisted on having a mortgage with a power of sale (*q*). No such demand was made or mortgage given, the bank never had a power to sell and convert the policy into money. The case of *Wylde v. Radford* seems to me one which I cannot distinguish. . . . I cannot distinguish the two cases, except that in that case the security was limited to a part of the property included in the deposited deeds, and in this case the security is limited to cover a part only of the debt. It seems to me that the express terms of this deposit were that sums not exceeding 4,000*l.* were to be paid out of the policy moneys, and it would be inconsistent with that, in the absence of any additional agreement, to allow the bank to hold the policy for something more."

So in the case of a documented bill, on its dishonour, the bank is not entitled to apply the security accompanying the bill to all other debts due from the customer who has deposited the bill with the bank (*r*).

(*n*) See p. 702, *supra*.

(*o*) See p. 710, *supra*.

(*p*) But see as to this *Talbot v. Frere* (1878), 9 Ch. D. 568; *In re Gregson*,

Christison v. Bolam (1887), 36 Ch. D. 223.

(*q*) *Sic*.

(*r*) *Latham v. Chartered Bank of India* (1874), 17 Eq. 205.

In *Wolstenholm v. Sheffield Union Banking Co.* (s) a partnership firm had an account and A., the senior partner, had also a private account with the same bankers: the two accounts being treated as separate accounts by the bankers. Both had been overdrawn, and certain deeds had been deposited by A. as security for the two accounts. An extension of credit to the amount of 500*l.* being required by the partnership firm for a short period, A. in the name of his firm deposited the lease of his house "for securing the overdraft of my own and firm's banking accounts beyond the arranged credits of 300*l.* and 2,400*l.* respectively." Some time after, the firm's account being above the limit agreed upon, it was closed. The lease was then sold, and the proceeds were handed to the bank. A.'s account was settled thereout, and the bank claimed to retain the surplus in respect of the firm's account. A. having become bankrupt, his trustee sued to recover the surplus. It was held that the lease was deposited merely for the purpose of securing repayment of 500*l.*; that the bankers had no such general lien on the proceeds of sale as to entitle them to retain the surplus of such proceeds in respect of the firm's overdrawn account, and that the same must accordingly be refunded. "The claim of the bank," said Lord Justice Lindley, "is to hold the surplus of separate property as if it were a security from the firm. *Primâ facie* a separate debt cannot be set off against a joint debt either at law, in equity, or under the mutual credit clauses of the Bankruptcy Act. There is no authority for the bankers having a general lien in such a case as the present. In order to succeed, therefore, the bankers must rely upon some special bargain; but the correspondence makes it clear that Wing had deposited the lease to secure the one particular advance and no more" (t).

On the other hand, where a customer from time to time deposits securities to cover advances, without any precise appropriation, the mere fact that certain bills are sent to the banker in view of a particular overdraft contemplated at the time will not exclude the lien.

(s) (1886), 54 L. T. 746.

(t) See also *Young v. Bank of Bengal* (1836), 1 Deac. 622; 1 Moo. P. C. 150;

Vanderzee v. Willis (1789), 3 Bro. C. C. 21; *London Chartered Bank of Australia v. White* (1879), 4 A. C. 413.

In *In re European Bank, Agra Bank Claim* (u), the O. Bank kept three accounts at the A. Bank, viz., a loan account, a discount account, and a general account. They from time to time received advances from the A. Bank, which were entered in the loan account and to meet which they deposited securities with the A. Bank. In the course of the transactions, the O. Bank deposited three bills of exchange with the A. Bank, accompanied by a letter stating that they proposed to draw upon them for 10,500*l.*, but that, as their credit would not afford a margin to that extent, they sent these bills as a collateral security. The O. Bank became insolvent and was wound up. It was held that there was nothing in the course of dealing or in the terms of the letter to exclude the general rule that a banker has a lien on the securities deposited by a customer for the customer's general balance, and that, the balance of the loan account being satisfied, the A. Bank might retain the bills for the balance of the general account (x).

"In truth," said Lord Justice James, "as between banker and customer, whatever number of accounts are kept in the books, the whole is really but one account, and it is not open to the customer, in the absence of some special contract, to say that the securities which he deposits are only applicable to one account" (y).

(u) (1872), L. R. 8 Ch. 41; 27 L. T. 732.

(x) *In re General Provident Assurance Co., Ex parte National Bank* (1872), 14 Eq. 507, cannot be regarded as an authority on this point, in view of the strictures passed upon it in *Talbot v. Frere* (1878), 9 Ch. D. 568, and *In re*

Gregson, Christison v. Bolam (1887), 36 Ch. D. 223.

(y) See *Thomas v. Howell* (1874), 18 Eq. 198; *Mutton v. Peat*, [1900] 2 Ch. 79, cited at p. 816, *infra*; and *In re London and Globe Finance Corporation*, [1902] 2 Ch. 416.

CHAPTER VII.

MORTGAGES AND PLEDGES.

As the result of special agreement, a banker may obtain security for a loan in the shape of a charge upon particular property of his customer.

It will be convenient to consider this subject in connection with the different kinds of property which are commonly charged by mortgage, pledge, or hypothecation.



SECTION I.

LANDS AND HOUSES.

*Mortgage by Deed.*

In the case of a mortgage by deed in ordinary form, if the mortgagor has the legal title in the property affected at the time of the execution of the mortgage, the legal title will pass to the bank, subject to the mortgagor's equity of redemption, which will continue until foreclosure, or sale, or until the Real Property Limitation Act, 1874 (*a*), has taken effect.

If the mortgagor has himself only an equitable interest—for example, if he has already executed an earlier legal mortgage, or if he is only a *cestui que trust*—a mortgage, although in the form of a deed, will only pass an equitable interest in the property affected to the bank.

Priority.—A banker who has acquired the legal estate by taking

(*a*) 37 & 38 Vict. c. 57.

a legal mortgage of property without notice of the existence of any earlier mortgage over it, will, subject to the provisions of the Land Transfer Acts (*a*) as to registration of title (*b*), have an effective security to the extent of the value of the property. There can only be one legal mortgagee, that is to say, one mortgagee who has obtained the legal estate; and the legal mortgagee is entitled to be paid off in full in priority to all equitable mortgagees of whose claims he had no notice at the time of advancing his money to the mortgagor. "A legal mortgagee," said Lord Justice Stirling, in *Taylor v. London and County Banking Company* (*c*), "who makes an advance without notice of a prior equitable title is a purchaser for value without notice. From such a purchaser a Court of Equity takes away nothing which he has honestly acquired."

If, before advancing his money, the banker has received notice of an outstanding equitable interest, he must see that it is got in or effectually destroyed at his peril (*d*).

The legal mortgagee may forfeit the priority which he would otherwise enjoy by negligence.

Thus it is important that the banker should obtain possession of the title-deeds. Otherwise his mortgage may be postponed to others.

In *Perry Herrick v. Attwood* (*e*) a first mortgagee had allowed the title-deeds to remain in the possession of the mortgagor to enable him to give another limited security. The mortgagor then made several mortgages, beyond the one contemplated, to mortgagees who had no notice of the first mortgage. It was held that the first mortgagee must be postponed to them (*f*).

Further Advances.—A legal mortgagee who makes a further advance to the mortgagor on the security of the property already mortgaged to him, without notice, at the time when he makes such

(*a*) 38 & 39 Vict. c. 87; 60 & 61 Vict. c. 65.

(*b*) As to the effect of a registered charge, see *Capital and Counties Bank v. Rhodes*, [1903] 1 Ch. 631.

(*c*) [1901] 2 Ch. 231, at p. 256.

(*d*) *Jared v. Clements*, [1903] 1 Ch. 428.

(*e*) (1857), 25 Beav. 205; 2 De G. & J. 21.

(*f*) See p. 610, *supra*; *Clarke v. Palmer* (1882), 21 Ch. D. 124; *Lloyds Bank v. Bullock*, [1896] 2 Ch. 192; *Oliver v. Hinton*, [1899] 2 Ch. 264; *Rimmer v. Webster*, [1902] 2 Ch. 163.

further advance, of any equitable mortgage, is entitled to tack the further advance to his legal mortgage. In other words, he may insist upon the further advance, as well as what is due under his original mortgage, being paid off in priority to any equitable mortgages (*g*).

On the other hand, even a first mortgagee whose mortgage was expressly taken to cover, not only what was due at the time, but also future advances within a fixed limit, cannot claim the benefit of his mortgage in respect of any such advance in priority over a second mortgagee of whose mortgage he had notice before he made it (*h*). This is so although the further advance is made in pursuance of an obligation or covenant on the part of the first mortgagee entered into at the time of the first mortgage (*i*).

Tacking Subsequent Equitable Mortgage.—A legal mortgagee is also entitled to tack an equitable mortgage. Thus, if an equitable mortgagee has advanced his money without notice of an earlier equitable mortgage, the legal mortgagee, upon buying the security of the later equitable mortgagee, will be entitled to be repaid the debt owing to the latter, as well as what is due upon his own legal mortgage, in priority to the intermediate incumbrancer (*k*).

Rights of Legal Mortgagee.—I. **Entry into Possession.**—Immediately after the execution of the mortgage deed, unless it contains a proviso for quiet enjoyment by the mortgagor until default, and, if it does, then immediately after default, the mortgagee may take possession of the mortgaged property. If it is in the occupation of tenants, he may give them notice to pay the rents to himself and receive them accordingly (*l*).

(*g*) *Brace v. Duchess of Marlborough* (1728), 2 P. Wms. 491.

(*h*) *Hopkinson v. Rolt* (1861), 9 H. L. C. 514 (a case of a mortgage to secure a current account). See also *London and County Banking Co. v. Ratcliffe* (1881), 6 A. C. 722; 51 L. J. Ch. 28; 45 L. T. 322; 30 W. R. 109; cited at p. 724, *infra*; *Union Bank of Scotland v. National Bank of Scotland* (1886), 12 A. C. 53; *The Benwell Tower* (1895), 72 L. T. 664; *Western Wagon and Property Co. v. West*,

[1892] 1 Ch. 271.

(*i*) *West v. Williams*, [1899] 1 Ch. 132. See also *Freenan v. Laing*, [1899] 2 Ch. 355; and p. 724, *infra*.

(*k*) *Marsh v. Lee* (1670), 2 Vent. 337. See also *Carlisle Banking Co. v. Thompson* (1884), 28 Ch. D. 398; *Nicholas v. Ridley*, [1904] 1 Ch. 192.

(*l*) *Keech v. Hall* (1778), 1 Doug. 21; *Moore v. Shelley* (1883), 8 A. C. 285; *Moss v. Gallimore* (1779), 1 Doug. 279.

II. Leasing.—A mortgagee in possession can, unless the contrary has been provided in the mortgage deed, or otherwise in writing, grant agricultural or occupation leases for any term not exceeding twenty-one years, and building leases for any term not exceeding ninety-nine years, provided that every such lease is to take effect in possession within twelve months from its date; that it reserves the best rent reasonably obtainable, and contains a covenant for the payment of rent and a proviso for re-entry if the rent is unpaid for a period not exceeding thirty days; and, in the case of a building lease, otherwise complies with the provisions of the Conveyancing and Law of Property Act, 1881 (*m*).

III. Appointment of Receiver.—After either (a) notice requiring payment of the mortgage money has been served on the mortgagor and default has been made for three months thereafter; or (b) interest is in arrear for two months; or (c) there has been a breach of some provision contained in the mortgage deed, or in the Conveyancing and Law of Property Act, 1881 (*n*), and on the part of the mortgagor to be observed or performed other than a covenant for payment of the principal or interest—the mortgagee may by writing under his hand appoint such person as he thinks fit to be receiver of the income of the mortgaged property or of any part thereof (*o*).

IV. Sale.—Where empowered as above mentioned to appoint a receiver, the mortgagee may sell the property by public auction or private contract (*p*).

V. Action for Payment.—The mortgagor may bring an action upon the covenant in the deed for payment of principal and interest.

VI. Action for Foreclosure or Sale.—The mortgagee, at any time after the mortgagor has made default, may obtain an order for foreclosure, that is to say, an order that, if the principal, interest and costs be not repaid in six months from the date of

(*m*) 44 & 45 Vict. c. 41, s. 18.

(*n*) 44 & 45 Vict. c. 41.

(*o*) *Ibid.* As to obtaining the appointment of a receiver and manager in an action for foreclosure, see *County of*

Gloucester Bank v. Rudry Merthyr Steam, &c. Co., [1895] 1 Ch. 629.

(*p*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), ss. 19, 20, 23.

the certificate of the amount due, the mortgagor shall be debarred and foreclosed of, and from, all equity of redemption. An order for sale, in lieu of foreclosure, may be made at any stage of the action (*q*).

VII. **Proof in Bankruptcy.**—A mortgagee may prove his debt as soon as he has valued his mortgage (*r*).

The above rights and remedies are enjoyed by a mortgagee by deed apart from express provisions in the deed itself, but special powers of sale, and of appointing a receiver, are not infrequently conferred thereby.

Right of Mortgagor to Redeem.—“A mortgage is a conveyance of land or an assignment of chattels as a security for the payment of a debt, or the discharge of some other obligation for which it is given. This is the idea of a mortgage; and the security is redeemable on the payment or discharge of such debt or obligation, any provision to the contrary notwithstanding. . . . Any provision inserted to prevent redemption on payment or performance of the debt or obligation for which the security was given is what is meant by a clog or fetter on the equity of redemption, and is therefore void. It follows from this that ‘once a mortgage always a mortgage’” (*s*).

Mortgage by Deposit or Memorandum.

A mere deposit of title-deeds by a borrower for the purpose of securing the repayment of a loan creates an equitable mortgage of the property to which they show title in favour of the lender. No writing or other formality is essential (*t*).

An equitable mortgage may also be created by any agreement in writing, however informal, that any property is to be a security for the repayment of a debt. Thus, an agreement to execute a

(*q*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 25.

(*r*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), Second Schedule, Rules 9—17. *In re Kit Hill Tunnel, Ex parte Williams*, W. N. (1881) 21.

(*s*) Per Lindley, M. R., in *Santley v.*

Wilde, [1899] 2 Ch. 474, cited with approval by the Earl of Halsbury, L. C., in *Noakes & Co. v. Rice*, [1902] A. C. 24, at p. 28.

(*t*) *Russel v. Russel* (1783), 1 Bro. C. C. 269; *Lloyd v. Attwood* (1858), 3 De G. & J. 614. See also *Lacon v. Allen* (1856), 26 L. J. Ch. 18.

legal mortgage (*u*), or a promise to deposit title-deeds as security for a loan (*x*), an authority to sell property and retain the debt out of the proceeds (*y*), will, if in writing, create an equitable mortgage of the property referred to. Forbearance from demanding immediate payment of an overdraft will be sufficient consideration to support such an agreement (*x*).

Writing Essential when no Deposit of Deeds.—If no deeds are deposited, written evidence of the agreement relied upon is essential (*z*).

A parol agreement to deposit a lease when granted as security for a sum of money advanced does not constitute an equitable mortgage (*a*).

In *Ex parte Hall, In re Whitting* (*b*), a customer in July borrowed 200*l.* from Hall & Co., his bankers, upon the terms of a verbal agreement that the loan should be repaid out of the rent of a farm which would become due to him at Michaelmas. The money was advanced, and the customer gave them the following letter, addressed by him to the tenants of the farm: "Dear Sirs,—When your Michaelmas rent becomes due to me, I hereby authorize and request you to pay to Messrs. Hall & Co., of Brighton, 200*l.* to my credit, for which I will accept their receipt as so much of your rent discharged." The bankers sent this letter to the tenants. The customer was adjudicated a bankrupt upon an act of bankruptcy committed in August. The letter was held not binding on the trustee.

"The real arrangement," said Jessel, M. R., "between the bankrupt and the bankers was a verbal one, he agreeing, in consideration of an advance by them, to charge in their favour rent which was not then due. That is a contract charging an interest in land, and the Statute of Frauds prevents us from receiving parol evidence to show what that verbal arrangement was. The only thing we can look at is the letter itself, which 'authorizes and

(*u*) *Tebb v. Hodge* (1869), 5 C. P. 73; 619; *Bennett v. Cooper* (1845), 9 Beav. 252.
Alliance Bank v. Broom (1864), 2 Dr. & Sm. 289; *In re Hurley's Estate* (1894), 1 Ir. R. 488.

(*x*) *Fullerton v. Provincial Bank of Ireland*, [1903] A. C. 309.

(*y*) *Eyre v. McDowell* (1861), 9 H. L. C.

(*z*) Statute of Frauds (29 Car. 2, c. 3), s. 4.

(*a*) *Ex parte Coombe, In re Beavan* (1819), 4 Mad. 249.

(*b*) (1878), 10 Ch. D. 615.

requests' the tenants to pay 200*l.* to the bankers. It amounts to nothing more than a request to pay the bankers. On the face of it, it is simply an authority revocable at any time, and, of course, it was revoked by the bankruptcy. It is said that it was in truth an equitable assignment, and not revocable, because it can be proved that it was given for value. The answer is, You cannot prove that, because the statute says that the agreement on which you rely must be evidenced by some writing. Consequently, the appellants are not entitled to rely on the verbal agreement."

In *Ex parte Brodrick, In re Beetham* (c), A., being indebted to a banking company in respect of an overdrawn account, made an oral promise to the directors to give them, when required, security for the debt. He was then entitled to a reversionary interest in one-fifth of a farm, to come into possession upon the death of his mother, who was tenant for life and held the title-deeds. The mother afterwards died, and the title-deeds came into the possession of the respondent, who was manager of the bank, and who was also entitled to one-fifth of the property. The respondent told A. that he had possession of the deeds, and that he held his (A.'s) one-fifth for the bank. A. expressed his assent. There was no memorandum of the deposit in the bank books. A. subsequently became bankrupt. It was held that the company had not a valid equitable mortgage of the bankrupt's share in the farm, as there was no memorandum in writing to satisfy the Statute of Frauds, and the conversation which took place between the bankrupt and the respondent as to the custody of the deeds, not being followed by any act which altered the legal position of the parties, was not such a part performance of the oral promise to give security as would exclude the operation of the statute.

Getting in the Legal Estate.—"An equitable mortgagee, who has made an advance without notice of a prior equitable title, may gain priority by getting in a legal title, unless there are circumstances which make it inequitable for him so to do. One case which falls within this exception is where the mortgagee has notice that the legal title, at the time when it is so got in, is held on an express trust in favour of persons who assert a claim to the property:

Saunders v. Dehew (*d*), *Allen v. Knight* (*e*), *Sharples v. Adams* (*f*), *Taylor v. Russell* (*g*). . . . A purchaser for value without notice is entitled to the benefit of a legal title, not merely where he has actually got it in, but where he has a better title or right to call for it. This rule is laid down in *Wilkes v. Bodington* (*h*). It has accordingly been held that if a purchaser for value takes an equitable title only, or omits to get in an outstanding legal estate, and a subsequent purchaser for value without notice procures, at the time of his purchase, the person in whom the legal title is vested to declare himself a trustee for him, or even to join as party in a conveyance of the equitable interest (although he may not formally convey or declare a trust of the legal estate), still the subsequent purchaser gains priority: see *Wilkes v. Bodington* (*h*), *Maundrell v. Maundrell* (*i*), *Stanhope v. Earl Verney* (*k*), *Wilmot v. Pike* (*l*), and *Rooper v. Harrison* (*m*)” (*n*).

Deposit of Land Certificate.—The Land Transfer Act, 1897 (60 & 61 Vict. c. 65), provides—

8. The registered proprietor of any freehold or leasehold land or of a charge may, subject to any registered estates, charges, or rights, create a lien on the land or charge by deposit of the land certificate or office copy of registered lease, or certificate of charge; and such lien shall, subject as aforesaid, be equivalent to a lien created by the deposit of title-deeds or of a mortgage deed of unregistered land by an owner entitled in fee simple or for the term or interest created by the lease for his own benefit, or by a mortgagee beneficially entitled to the mortgage.

The banker is protected by the following provisions:—

8.—(1.) So long as a land certificate, office copy of a registered lease, or certificate of charge is outstanding, it shall be produced to the registrar on every entry in the register of a disposition by the registered proprietor of the land or charge to which it relates, and on every registered transmission or rectification of

(*d*) (1692), 2 Vern. 271.

(*e*) (1846), 5 Hare, 272; affirmed,
11 Jur. 527.

(*f*) (1863), 32 Beav. 213.

(*g*) [1892] A. C. 244, 259.

(*h*) (1707), 2 Vern. 599.

(*i*) (1805), 10 Ves. 246, 270; 7 R. R.

H.

393.

(*k*) (1761), 2 Eden, 81.

(*l*) (1845), 5 Hare, 14, 22.

(*m*) (1855), 2 K. & J. 86, 106.

(*n*) Per Stirling, L. J., in *Taylor v. London and County Banking Co.*, [1901] 2 Ch. 231, at pp. 256, 262, 263.

the register, and a note of every such entry, transmission, or rectification shall be officially indorsed on the certificate or office copy, and the registrar shall have the same powers of compelling the production of certificates and office copies as are conferred on him by sections one hundred and nine and one hundred and ten of the principal Act as to the production of maps, surveys, books, and other documents.

The Land Transfer Rules, 1903, provide—

Rule 243. Any person with whom a land certificate or certificate of charge is deposited as security for money may by registered letter, or otherwise in writing, give notice to the registrar of such deposit, and of his name and address; and shall describe (by reference to the county and parish or place and number of the title) the land to which the certificate relates, and on receipt of such notice the registrar shall enter the same in the Charges Register, and shall give a written acknowledgment of its receipt. Such notice shall operate as a caution under section 53 of the Act of 1875.

Rule 244. A person applying for registration as proprietor of land or of a charge may, whether the land or charge is already registered or not, create a lien on the land or charge equivalent to that created by the deposit of a certificate by giving notice in writing, signed by himself, to the registrar, that he intends to deposit the land certificate or certificate of charge when issued with another person as security for money.

Rule 245. The notice of such intended deposit shall state the name and address of the person with whom the certificate is to be deposited, and shall describe the land or charge to which the certificate relates by reference to the county and parish or place and number of the title, or (in the case of unregistered land) by reference to the deed or document by which the land was last dealt with, or otherwise to the satisfaction of the registrar. On receipt of such notice the registrar shall enter the same in the register, and give a written acknowledgment thereof.

Rule 246. A notice of intended deposit shall operate as a caution under section 53 of the Act of 1875. The certificate shall, when issued or re-issued, be delivered by the registrar to the person named in that behalf in the notice.

Rule 251. The lien created by the deposit of a certificate or by notice to the registrar under Rule 244 shall be subject to any unregistered estates, rights, or interests protected by caution or other entry on the register at the time of the creation of the lien, and in the case of good leasehold qualified or possessory

title, to estates rights and interests excepted from the effect of registration (o).

Subsequent Advances.—I. **Scope of Memorandum.**—In *Hibernian Bank v. Gilbert* (p) a memorandum stated that deeds were deposited “as collateral and continuing security for any advances from” the mortgagees. It was held that the mortgage covered past as well as future advances by the bank.

In *Ulster Bank v. Synnott* (q) the defendant, being indebted to his banker, deposited certain certificates of stock, accompanied by a letter stating that they were so deposited “against acceptances made” on his account. It was held that this expression might mean either “acceptances which have been heretofore made,” or “acceptances which shall have been made during the continuance of the security”; and that being, therefore, ambiguous, parol evidence was admissible to aid the construction as to whether it was intended to cover future as well as past acceptances.

In *Murton v. City Bank* (r) the memorandum was to the following effect:—“To the City Bank, Limited. At the request of G. M. I have transferred, &c., into the names of Messrs. D. G. H. P. and H. W. S. as trustees for you, to be held as collateral security for your advances to the above G. M., and as subject to his arrangements with you, and you will please, when prepared to do so, transfer or deliver the securities as he may desire.” It was held that the mortgage covered not merely advances which had been made at its date, but also such advances as were afterwards made to G. M. from time to time (s).

A mortgage “to cover overdraft” will extend to overdue bills charged to the mortgagor’s account, as well as to money drawn out by cheques (t). And a mortgage for “debts due or growing due”

(o) Accordingly, when the land is registered with a possessory or qualified title, the title-deeds prior to registration, as well as the land certificate, should be deposited with the banker: see *Brickdale & Sheldon’s Land Transfer Acts*, pp. 100, 295—297.—As to the registration of equitable mortgages of land subject to the *Middlesex Registry Acts*, 1708 and 1891, or the *Yorkshire Registries Act*, 1884, see *Robbins on Mortgages*, vol. 2, pp. 1243—1244.

(p) (1889), 23 L. R. Ir. 321.

(q) (1871), 5 Ir. R. Eq. 595.

(r) (1891), 8 T. L. R. 86.

(s) In this case the bank were held, upon the evidence, to be *bonâ fide* purchasers for value without notice of, and to have obtained a complete title to, stock which the plaintiff alleged had been fraudulently dealt with by her brother G. M.—See also *Meek v. Wallis* (1872), 27 L. T. 650.

(t) In *re Joseph Williams* (1869), 3 Ir. R. Eq. 346.

was held to cover the contingent liability of the mortgagor on a bill drawn by him and accepted by a third party, and delivered to the bank against his own acceptances, the bill having been afterwards dishonoured (*u*).

II. Notice of another Mortgage or of Sale.—Although an equitable mortgage has been expressly made to cover future advances, the banker cannot claim its benefit in respect of such an advance in priority to another mortgagee, or a purchaser, of whose advance or title respectively he had notice at the time of his own advance (*x*).

In *London and County Banking Co. v. Ratcliffe* (*y*) the owner of land, after depositing the title-deeds with a bank as security for all sums then or thereafter to become due on the general balance of his account with the bank, contracted with the knowledge of the bank to sell the land to one who had notice of the terms of the deposit. The vendor afterwards paid in to his own account at the bank sums which in the whole exceeded the debt due to the bank on his balance at the time of the contract of sale, so that on the principle of *Clayton's Case* (*z*) that debt was discharged. The bank, without giving notice to the purchaser, continued the account and made fresh advances to the vendor, so that on the general balance there was always a debt to the bank. The purchaser, who never had notice of the fresh advances, paid the purchase-money by instalments to the vendor. It was held that, on the principle of *Hopkinson v. Rolt* (*a*), the bank had no charge on the land as against the purchaser for the fresh advances, and also that the bank had no charge upon the purchase-money. Lord Blackburn expressed the view that a purchaser of land with notice that the title-deeds have been deposited with a bank as security for the general balance on the vendor's present and future account, is not bound to inquire whether the bank has after notice of the purchase made fresh advances, but that the burden lies on the bank advancing

(*u*) *Merchants' Bank of London v. Maud* (1870), 19 W. R. 657.—In *Tindall v. Barnetts* (1887), 3 T. L. R. 476, securities deposited by brokers, at the time of contracting a "call loan," were held to have been pledged to cover the balance of the entire account between the brokers and the bankers, and not merely for the amount of the particular loan. Cf.

Latham v. Chartered Bank of India (1874), 17 Eq. 205; and pp. 655—657 and 670—676, *supra*.

(*x*) See pp. 598—600 and 715—716, *supra*.

(*y*) (1881), 6 A. C. 722.

(*z*) See p. 167, *supra*.

(*a*) (1861), 9 H. L. C. 514, cited at p. 716, *supra*.

on the security of the unpaid vendor's lien to give the purchaser notice that it has so done or intends so to do (*b*).

III. **Change in Banking Firm.**—Where securities have been deposited to cover future advances by bankers, *primâ facie* they extend only to advances made before any change in the firm (*c*).

But where a bankrupt had deposited title-deeds with his bankers to secure future advances, and after a change in the banking partnership continued for six years the same mode of dealing with them, and the same running account, it was held that there had been a tacit recognition of the deposit of the deeds with the new firm upon the same terms as with the old (*d*).

"It appears to me," said Sir John Cross, in *Ex parte Smith* (*e*), "to be of no consequence how many changes may have taken place in the constitution of the firm, provided the title-deeds were left in the custody of the partners for the time being, with the consent of the depositors, and upon the understanding that they were to remain a security for the balance of the account. It is not necessary that on every change or modification of the partnership, the deeds should be returned for the purpose of being deposited anew. The fact of their being left at the bank may operate as a fresh deposit, and the parties may express their intention as clearly by acts as they could by words" (*f*).

The effect of the amalgamation of a company has been dealt with at pages 41—43.

Risks Incurred by Banker.—Several risks are incurred in advancing money upon an equitable mortgage.

I. If a prior legal mortgage exists at the time when the banker takes an equitable mortgage, or a legal mortgage is subsequently created without notice, on the part of the legal mortgagee, of the banker's equitable mortgage, the latter will generally be postponed.

If, however, a prior legal mortgagee has been guilty of fraud, or of negligence which has enabled the mortgagor to commit a fraud upon the equitable mortgagee, the latter will take priority (*g*).

(*b*) See also *Parkinson v. Wakefield & Co.*, cited at p. 193, *supra*.

(*c*) Per Lord Eldon in *Ex parte Kensington* (1813), 2 V. & B. 79, at p. 83.

(*d*) *Ex parte Oakes and others* (1841), 2 M. D. & De G. 234.

(*e*) (1841), 2 M. D. & De G. 314.

(*f*) See also *Bank of Scotland v. Christie* (1840), 8 Cl. & F. 214; *Ex parte M'Kenna, City Bank Case* (1861), 3 De G. F. & J. 629; 30 L. J. Bank. 20.

(*g*) *Northern Counties of England Insur-*

In *Briggs v. Jones* (*h*) B., a mortgagee of leasehold property, lent the lease to the mortgagor in order that he might raise money upon it, but at the same time told the mortgagor to inform the person from whom he proposed to borrow that B. had a prior charge. The mortgagor borrowed money from his bankers, upon the security of a deposit of the lease, without giving them notice of B.'s mortgage. It was held that B.'s mortgage must be postponed to that of the bankers.

An omission on the part of the legal mortgagee to insist upon the production of the title-deeds at the time of making his advance, will not necessarily amount to negligence in consequence of which he will be postponed to a subsequent incumbrancer. For example, if he has inquired why the deeds are not forthcoming, and received what appeared to be a reasonable explanation, he will not be postponed (*i*).

Existing Debentures.—In the case of a mortgage by a company the effect of existing debentures may have to be considered.

“The effect of a debenture charging ‘the undertaking,’ or the ‘undertaking and property,’ or ‘all the estate, property and effects’ of the company, is to create a charge of which the debenture holders may, no doubt, as against the going company, avail themselves by the appointment of a receiver, and which upon the winding-up of the company attaches upon the property of the company as it exists at that date; but which, until effective appointment of receiver or winding-up commenced, leaves the company free to dispose of its property by sale or mortgage while carrying on its business in the ordinary course; and a mortgage so executed may have priority over the charge of the undertaking, even though the charge on the undertaking be expressed to be a first charge on the undertaking, lands and effects” (*k*).

In *Wheatley v. Silkstone and Haigh Moor Coal Co.* (*l*) the directors of a company with power to borrow or create mortgages or issue debentures, issued debentures purporting to charge the undertaking and the hereditaments and effects of the company

ance Co. v. Whipp (1884), 26 Ch. D. 482: see as to this case, p. 730, *infra*. See also *Maxfield v. Burton* (1873), 17 Eq. 15; *Oliver v. Hinton*, [1899] 2 Ch. 264.

(*h*) (1870), 10 Eq. 92.

(*i*) *Agra Bank v. Barry* (1874), L. R. 7 H. L. 135.

(*k*) *Buckley on Companies*, 8th ed. pp. 188-9.

(*l*) (1885), 29 Ch. D. 715.

with the payment of the sums mentioned in the debentures respectively, to the intent that the debentures might rank equally as a first charge on the undertaking, hereditaments and effects of the company. They afterwards, in consideration of 4,000*l.* advanced and applied to the purposes of the company, deposited with the plaintiff the title-deeds of the colliery, which was the property of the company, and by a written agreement charged the property comprised in the deeds with the payment to the plaintiff of 4,000*l.*, and interest. It was held that the mortgage to the plaintiff had priority over the debentures.

If the debentures expressly provide that the company shall not be at liberty to create any mortgage or charge in priority to or ranking *pari passu* with them, a charge subsequently created in favour of a banker or other person who has notice of this provision will be postponed to the charge created by the debentures. But if he obtains the legal estate without such notice he will obtain priority (*m*).

Under certain circumstances, even if he only obtains an equitable mortgage, he may get a better equity than the debenture holders have.

In *In re Castell and Brown, Limited, Roper v. Castell and Brown, Limited (n)*, a limited company had, in 1885, issued a series of debentures charged upon all its property, both present and future, such charge to be a floating security, but so that the company was not to be at liberty to create any mortgage or charge upon its freehold or leasehold hereditaments in priority to the said debentures. In 1895 the company deposited the title-deeds of some of its property with its bankers, on a memorandum of charge under seal, as a security for an overdraft. When this charge was given, the bank had no notice of the existence of the debentures, and made no inquiries. In 1896 a debenture holders' action to enforce the security was commenced, in which an inquiry as to priorities was directed. It was held that the debenture holders, having left the title-deeds with the company, so as to enable it to deal with its property as if it had not been incumbered, could not set up their prior charge against the equitable mortgage to the bank; that the

(*m*) See Lindley on Companies, 6th ed. p. 322.

(*n*) [1898] 1 Ch. 315.

bank had not been guilty of negligence, and, having a stronger equity than the debenture holders, was entitled to priority (*o*).

There is no rule of law that a banker, in his dealings with each customer, is to be deemed to be fixed with notice of the contents of every document deposited with him as a security by every other customer (*p*).

In *In re Valletort Sanitary Steam Laundry Co., Ward v. Valletort Sanitary Steam Laundry Co.* (*q*), on November 26, 1898, the managing director of a limited company, forgetting that their first mortgage debentures, though only constituting a floating security, precluded the creation of any prior charge, deposited the company's title-deeds with their bank to secure the present and future overdraft of their current account. The bank, though aware that the debentures had been issued, some of which they held as security for another customer's account, made no inquiry in the matter. It was held that the mere possession of the debentures as security for another customer's account did not affect the bank with notice of their contents in their dealing with the company; and also that, as the company's managing director, by depositing the title-deeds, impliedly represented that the company could give a valid first charge, the bank, though aware that debentures had been issued, were not put on inquiry, and were entitled to priority.

On March 17, 1900, the company issued a second mortgage debenture to the bank as a collateral security for an extended overdraft. This debenture was expressed to be subject to the first mortgage debentures. It was held that the bank did not thereby obtain notice of the terms of the first mortgage debentures, so as to postpone their equitable mortgage in respect of subsequent advances.

II. A prior equitable mortgage may exist.

But if the prior equitable mortgagee has, through carelessness or imprudence, omitted to obtain possession of the title-deeds, or to make inquiry about them, he may be postponed to the subsequent equitable mortgagee. In order to postpone a prior

(*o*) See also *English and Scottish Mercantile Investment Co. v. Brunton*, [1892] 2 Q. B. 700, cited in Section 7, *infra*; *In re Valletort Sanitary, &c. Co.*, see note (*q*), *infra*; *Edward Nelson & Co. v.*

Faber & Co., [1903] 2 K. B. 367.

(*p*) Per Swinfen Eady, J., in the next cited case, at p. 659 of [1903] 2 Ch.

(*q*) [1903] 2 Ch. 654; 19 T. L. R. 593.

equitable mortgagee, it is not necessary to show that he has been guilty of negligence amounting to, or which is evidence of, fraud (*r*).

III. The risk of tacking, which is explained above (*s*), has also to be taken into account.

IV. Other prior equitable interests, such as those of *cestuis que trustent*, may exist. Absence of notice is not in itself a sufficient protection against these (*t*). Even where the deeds are deposited with the banker, if the circumstances of the case are such as to affect him with constructive notice of the equitable interest of another, he will be postponed (*u*).

In *National Provincial Bank of England v. Jackson* (*x*) A., a solicitor, on the 18th January, 1883, obtained from his sisters, B. and C., their signatures to two deeds, by which, in alleged consideration in each case of the release of a debt of 400*l.* and payment to them of 300*l.*, they conveyed their shares of freehold property, which was subject to a mortgage to K., to A. in fee. No money was at the time due from B. and C. to A., nor was any payment whatever made to them. The deeds were not read over or explained to B. and C., who had no idea that they were thereby conveying their property, and signed in full reliance on A.'s statement that he was going to clear off the mortgage and wanted to send the deeds to K. On the next day A. deposited the deeds with a bank as security for an advance. In applying for the advance before the execution of the deeds, A. had told the managers that B. and C., who were joint owners with himself of the property, were going to convey and "were assisting with the deeds," but that nothing would be paid to them as consideration money, as the money was to be invested in a colliery in which A. was interested. The manager handed over the deeds to the solicitor of the bank, and merely told him that he was to exercise great care and diligence in investigating the title. The solicitor being dead it did not appear what inquiries were made by him, but the advance was made to A. A. having absconded, the pro-

(*r*) *Farrand v. Yorkshire Banking Co.* (1888), 40 Ch. D. 182.

(*s*) At pp. 715—716, *supra*.

(*t*) *Stackhouse v. Countess of Jersey*

(1861), 1 J. & H. 721.

(*u*) *Ibid.* See also *Welchman v. Coventry Union Bank* (1860), 8 W. R. 729.

(*x*) (1886), 33 Ch. D. 1.

perty was claimed by the bank as equitable mortgagees, and the claim was resisted by B. and C. on the ground that the conveyances, having been obtained by fraud and misrepresentation, were void as against them. They also relied on deeds which purported to be reconveyances of the property by A. to B. and C., of the 18th of January, 1883, which were attested but did not bear a seal, and which had only been discovered amongst A.'s papers after he had absconded. It was held that, inasmuch as B. and C., though they might not understand the nature of the deeds, knew they were executing something which dealt in some way with their property, the deeds of the 18th of January, 1883, were not void but voidable only. But as the statements made by A. to the bank manager were such as to have clearly put the bank upon inquiry, which would, if made, have led to the detection of the fraud and to a refusal of the advance, and therefore to have affected the bank with constructive notice of the fraud, the equity of the bank must, on the ground of their negligence, be postponed to that of B. and C. The rule that the Court will not postpone a legal mortgagee to a subsequent equitable mortgagee on the ground of any mere carelessness or want of prudence (*y*) does not apply as between two equitable claims. It was also held that the absence of a seal from the deeds of reconveyance—there being no evidence that they had ever been sealed—rendered them invalid.

Priority over Judgment Creditor.—An equitable mortgagee is entitled to enforce his charge in priority to a creditor of the mortgagor, who, without notice of the equitable mortgage, has subsequently thereto recovered judgment against the mortgagor, and obtained actual possession of the lands by writ of elegit and attornment of the tenants (*z*).

Precautions Necessary Before Lending upon an Equitable Mortgage.

(a) A memorandum should always be signed by the borrower. Even where not legally necessary, owing to the fact of the deposit of

(*y*) *Northern Counties of England Fire Insurance Co. v. Whipp* (1884), 26 Ch. D. 482. Cf. *Taylor v. London and County Banking Co.*, [1901] 2 Ch. 231.

(*z*) *Whitworth v. Gaugain* (1844), 3 Hare, 416. Cf. *Langton v. Horton* (1842), 1 Hare, 549.

title-deeds, it is always desirable, inasmuch as it furnishes clear evidence as to the nature, scope and terms of the transaction (*a*).

(b) The title-deeds should always be taken into the possession of the banker with a view to his protection against the interests of others.

(c) If there is anything in the circumstances of a suspicious character, or which suggests that others, beside the borrower, are interested in the property, the banker should make full and searching investigation. He can only rely upon the equitable mortgage if he has no actual notice of other interests, and there is nothing in the circumstances which affects him with constructive notice of such interests (*b*).

The position in the case of registered land is stated above (*c*).

Rights of Equitable Mortgagee.—Usually the memorandum will itself expressly define the rights of the banker. Apart from such provision he will have the following remedies.

1. Foreclosure.—On failure of the borrower to pay the interest and principal, the bank can obtain an order for foreclosure, that is to say, an order that, if the principal, interest and costs be not repaid in six months from the date of the order, the borrower shall convey his interest in the mortgaged property to the bank (*d*).

2. Sale.—Upon default by the borrower the bank may, instead of an order for foreclosure, obtain an order for sale, if the Court think fit to grant it (*e*).

3. Receiver.—Upon the application of the bank the Court will appoint a receiver (*f*).

Rights of the Mortgagor.—1. Redemption.—The borrower may redeem the mortgaged property at any time by paying the principal, interest and costs which are due in respect of it.

An equitable mortgagee by deposit of title-deeds of land, accom-

(*a*) See per Lord Cairns in *Shaw v. Foster* (1872), 5 E. & I. A. 321, at p. 340.

(*b*) As to the question when notice to an official amounts to notice to his company, see *In re Fenwick, Stobart & Co., Deep Sea Fishery Co.'s Claim*, [1902] 1 Ch. 507.

(*c*) At pp. 721—722.

(*d*) *Marshall v. Shrewsbury* (1875), 10 Ch. 250, at p. 254.

(*e*) Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 25 (2). See *In re Hodson and Howes' Contract* (1887), 35 Ch. D. 668.

(*f*) *Bodger v. Bodger* (1862), 11 W. R. 160.

panied by a memorandum of deposit, is not entitled to six months' notice before he is bound to accept a tender of the amount due, nor to six months' interest in lieu of notice. In the case of a regular mortgage deed with a proviso for redemption, the just inference is that the loan on mortgage is intended to be of a permanent character, and that the parties intended that, after default, the mortgagee should be entitled to a six months' notice; but where the just inference from the transaction is that the mortgage is merely temporary, as is the case where the mortgage is in the usual form by deposit merely, then it is not reasonable to infer that the parties intended that so long a notice should be given. Mr. Justice Chitty said, however, in the case in which this was decided (*g*), that "The mortgagor . . . must not act unreasonably or vexatiously; he must at least give the mortgagee a reasonable time, though it may be short, to look up the deeds."

Upon receiving payment of the amount covered by the mortgage, the banker must deliver up the title-deeds (*h*).

When a security has been deposited in respect of a specific sum, and not on the general account, simple interest only is due to the banker. If he improperly, or without title, retains moneys which have been overpaid to him as mortgagee, he is chargeable with interest thereon (*i*).

2. The mortgagor may obtain from the Court, instead of an order for redemption, an order for sale, or for sale or redemption in the alternative (*k*).

Surrender of the Security.—Where a banker has taken a security from a customer, the Court will not hold that it has been given up and the mere personal liability of another person accepted in substitution for it in the absence of cogent evidence of a release by the banker of his rights upon the security (*l*).

(*g*) *Fitzgerald's Trustee v. Mellersh*, [1892] 1 Ch. 385.

(*h*) *Ex parte Adair, In re Gross* (1871), 24 L. T. 198. See also p. 718, *supra*.

(*i*) *London Chartered Bank of Australia v. White* (1879), 4 A. C. 413.

(*k*) Conveyancing Act, 1881, s. 25 (1).

(*l*) *National Provincial Bank of England v. Sheffield* (1888), 4 T. L. R. 629.

Fixtures.

Whether a mortgage is effected by way of a deed creating a legal mortgage, or by a deposit of title-deeds or other form of equitable mortgage, it will pass to the mortgagee, together with the land or house, the fixtures thereon, unless they are excluded either expressly or by implication.

"It is clear law that, though a fixture may be removable as between landlord and tenant, or as between tenant for life and remainderman, being attached so and under such circumstances as to show it to be a fixture in that sense only, and not so as to make it permanently part of the freehold, yet it nevertheless will form part of the property subject to a mortgage of the premises, and a mortgagor cannot remove it as against a mortgagee" (*m*).

In *Longbottom v. Berry* (*n*) the owner in fee in possession of land and premises deposited the title-deeds with a banking company as an equitable mortgage to secure the balance of his account with them for the time being. He then erected a mill, and set up, not only steam power applicable to all mills, but machinery applicable only to the purposes of a particular manufacture which he carried on there. He afterwards made a bill of sale of all the machinery, the assignee having notice of the previous deposit of the deeds. It was held, as between the mortgagees and assignee, that all of the machinery which was annexed to the floor, ceilings, or sides of the building, in a "quasi permanent manner," by means of bolts and screws, passed to the mortgagees; and that it made no difference that the object of the annexation was merely to steady the machines when in use, and that they could be removed without any injury to them or the freehold, nor that the machines were in the nature of trade fixtures, which would, as between landlord and tenant, belong to the tenant.

In *Ex parte Astbury, Ex parte Lloyd's Banking Company, In re Richards* (*o*), an iron manufacturer made an equitable mortgage of his rolling mills, of which he held a lease, and shortly afterwards became bankrupt. Besides the fixed machinery, the mills contained

(*m*) Per Collins, M.R., in *Reynolds v. Ashby & Son, Ltd.*, [1903] 1 K. B. 87, at p. 99.

(*n*) (1869), L. R. 5 Q. B. 123.

(*o*) (1869), 4 Ch. 630.

the following chattels used in the manufacture: (1) A large number of duplicate iron rolls of various sizes made to be fitted into the machine, and used for different sizes of iron; some of these were fitted to the machine, and had been used, and others had not yet been fitted. (2) Straightening plates, which were broad iron plates embedded in the floor for straightening the iron when taken out of the furnace. (3) Weighing machines, which were deposited in holes dug in the earth and lined with brickwork, so that the weighing plate was level with the surface of the ground, but which were not fixed to the brickwork. It was held, on a case stated in the bankruptcy between the mortgagees and the assignees—first, that such of the rolls as had been fitted to the machine were fixtures, and passed to the mortgagees, but that such of the rolls as had not been fitted to it were not fixtures, and belonged to the assignees; secondly, that the straightening plates were fixtures, and passed to the mortgagees; and, thirdly, that the weighing machines were not fixtures, and belonged to the assignees.

In *Gough v. Wood & Co. (p)*, by agreement between the defendants and E., who was tenant for a term of years of a piece of land, the defendants agreed to supply him with a boiler for the purpose of his trade, to be paid for by instalments, and to remain the property of the defendants till all the instalments were paid; and it was further agreed that, in case of default of payment of any of the instalments, the defendants might enter and carry away the boiler. E. then mortgaged his interest in the land by underlease to the plaintiff, who had no notice of the agreement, and who allowed E. to remain in possession. The defendants afterwards supplied the boiler, which was fixed in the land. One of the instalments not being paid, the defendants entered and carried the boiler away. It was held that the plaintiff, having allowed the mortgagor to remain in possession, must be taken to have acquiesced in his making agreements for fixing and removing fixtures for the purposes of his trade, and that he could not claim the boiler as against the defendants.

This case was distinguished in *Reynolds v. Ashby & Son*,

(p) [1894] 1 Q. B. 713; following *port Hematite Iron and Steel Co.*, [1892] 1 Ch. 415.
Cumberland Union Banking Co. v. Mary-

Limited (q). There machines were supplied by the plaintiff, on the hire-purchase system, to the lessee for a long term of years of a factory, which he had mortgaged. The machines were affixed to the premises by the plaintiff's workmen by means of upright bolts let into the floor, which passed through holes in the bases of the machines, and upon which nuts were screwed. By the terms of the hire-purchase agreement the machines were not to become the property of the mortgagor until the last of a series of payments for their hire had been made by him, and, if default were made in those payments, the plaintiff was to have power to determine the hiring and remove the machines. The mortgagor failed to make the specified payments. The mortgagees having entered into possession of the factory, the plaintiff gave notice to determine the hiring, and claimed to remove the machines, but the mortgagees refused to give them up, claiming them as fixtures. In an action brought by the plaintiff against the mortgagees to recover the machines or their value, the judge held, on the authority of *Hobson v. Gorringe* (r), that the machines were fixtures, and gave judgment for the defendants without leaving any question to the jury. It was held by the Court of Appeal that the decision of the judge was right.

In *Lyon & Co. v. London City and Midland Bank* (s) the plaintiff had let on hire to the occupier of certain premises a number of chairs for a public entertainment, the hirer agreeing to pay 20*l.* a week for their use, and to have the option of purchasing them within three months for 676*l.* In accordance with the requirements of the local authority, the seats were fastened by screws to the floor. The hirer, who did not exercise his option of purchase, mortgaged to the defendants by deed the premises, together with all the fixtures then or thereafter to be affixed or attached thereto. It was held that the chairs had never ceased to be chattels, and did not pass to the mortgagees.

(q) [1903] 1 K. B. 87.

(r) [1897] 1 Ch. 182.

(s) [1903] 2 K. B. 135; 19 T. L. R. 334.



SECTION II.

SHIPS.

A ship entirely owned by natural-born or naturalized British subjects, or by denizens, or by bodies corporate established under and subject to the laws of some part of the King's dominions and having their principal place of business there (*t*), must be registered, as a British ship, under the Merchant Shipping Act, 1894 (*u*).

Mortgages of British ships are regulated by this Act.

Statutory Provisions.

A registered ship or a share therein may be made a security for a loan or other valuable consideration (*x*).

The mortgage, or instrument creating the security, must be in one of the forms prescribed in the first part of the First Schedule to the Act, or as near thereto as circumstances permit, or in such form as altered by the Commissioners of Customs after public notice and with the consent of the Board of Trade. These forms can be obtained from any registrar of British ships (*y*).

Upon the production of an instrument in the required form to the registrar of the ship's port of registry, he must record it in the register book (*z*).

A registrar shall not be required, without the special direction of the Commissioners of Customs, to receive and enter in the register book any bill of sale, mortgage, or other instrument for the disposal or transfer of any ship, or share, or any interest therein, which is made in any form other than that for the time being required, or which contains any particulars other than those contained in such form (*a*).

The Merchant Shipping Act further provides—

31.—(2.) Mortgages shall be recorded by the registrar in the order in time in which they are produced to him for that purpose, and the registrar shall by memorandum under his hand

(*t*) 57 & 58 Vict. c. 60, s. 1.

(*u*) *Ibid.* s. 2.

(*x*) *Ibid.* s. 31 (1).

(*y*) *Ibid.* s. 31 (1); s. 65.

(*z*) *Ibid.* s. 31 (1).

(*a*) *Ibid.* s. 65 (2).

notify on each mortgage that it has been recorded by him, stating the day and hour of that record.

32. Where a registered mortgage is discharged, the registrar shall, on the production of the mortgage deed, with a receipt for the mortgage money indorsed thereon, duly signed and attested, make an entry in the register book to the effect that the mortgage has been discharged, and on that entry being made the estate (if any) which passed to the mortgagee shall vest in the person in whom (having regard to intervening acts and circumstances, if any) it would have vested if the mortgage had not been made.

33. If there are more mortgages than one registered in respect of the same ship or share, the mortgagees shall, notwithstanding any express, implied, or constructive notice, be entitled in priority, one over the other, according to the date at which each mortgage is recorded in the register book, and not according to the date of each mortgage itself.

34. Except as far as may be necessary for making a mortgaged ship or share available as a security for the mortgage debt, the mortgagee shall not by reason of the mortgage be deemed the owner of the ship or share, nor shall the mortgagor be deemed to have ceased to be owner thereof.

A mortgagee is not entitled to unpaid freight which has become due previously to the date of his taking possession of the ship (*b*).

But the first registered mortgagee, by taking possession of the ship before the freight is completely earned, obtains a legal right to receive the freight, and to retain thereout, not only what is due on his first mortgage, but also the amount of any subsequent charge which he may have acquired on the freight, in priority to every equitable charge of which he had no notice; and it makes no difference if a subsequent incumbrancer was the first to give notice to the charterers of his charge on the freight (*c*).

35. Every registered mortgagee shall have power absolutely to dispose of the ship or share in respect of which he is registered, and to give effectual receipts for the purchase-money; but where there are more persons than one registered as mortgagees of the same ship or share, a subsequent mortgagee shall not, except under the order of a Court of competent jurisdiction,

(*b*) *Shillito v. Biggart*, [1903] 1 K. B. 683; 19 T. L. R. 313.

(*c*) *Liverpool Marine Credit Co. v. Wilson* (1872), 7 Ch. 507.

sell the ship or share without the concurrence of every prior mortgagee.

36. A registered mortgage of a ship or share shall not be affected by any act of bankruptcy committed by the mortgagor after the date of the record of the mortgage, notwithstanding that the mortgagor at the commencement of his bankruptcy had the ship or share in his possession, order, or disposition, or was reputed owner thereof, and the mortgage shall be preferred to any right, claim, or interest therein of the other creditors of the bankrupt, or any trustee or assignee on their behalf.

37. A registered mortgage of a ship or share may be transferred to any person, and the instrument effecting the transfer shall be in the form marked C in the first part of the First Schedule to this Act, or as near thereto as circumstances permit, and on the production of such instrument the registrar shall record it by entering in the register book the name of the transferee as mortgagee of the ship or share, and shall by memorandum under his hand notify on the instrument of transfer that it has been recorded by him, stating the day and hour of the record.

38.—(1.) Where the interest of a mortgagee in a ship or share is transmitted on marriage, death, or bankruptcy, or by any lawful means, other than by a transfer under this Act, the transmission shall be authenticated by a declaration of the person to whom the interest is transmitted, containing a statement of the manner in which and the person to whom the property has been transmitted, and shall be accompanied by the like evidence as is by this Act required in case of a corresponding transmission of the ownership of a ship or share.

(2.) The registrar, on the receipt of the declaration, and the production of the evidence aforesaid, shall enter the name of the person entitled under the transmission in the register book as mortgagee of the ship or share.

39. A registered owner, if desirous of disposing by way of mortgage or sale of the ship or share in respect of which he is registered at any place out of the country in which the port of registry of the ship is situate, may apply to the registrar, and the registrar shall thereupon enable him to do so by granting a certificate of mortgage or a certificate of sale (*d*).

Pledges of the certificate of registry are expressly excluded.

15.—(1.) The certificate of registry shall be used only for the

(*d*) See also sects. 40—43, 45 and 46 of the Act.

lawful navigation of the ship, and shall not be subject to detention by reason of any title, lien, charge, or interest whatever had or claimed by any owner, mortgagee, or other person to, on, or in the ship (*e*).

Trusts. 56. No notice of any trust, express, implied, or constructive, shall be entered in the register book or be receivable by the registrar, and, subject to any rights and powers appearing by the register book to be vested in any other person, the registered owner of a ship or of a share therein shall have power absolutely to dispose in manner in this Act provided of the ship or share, and to give effectual receipts for any money paid or advanced by way of consideration.

Equitable Mortgages. 57. The expression "beneficial interest," where used in this Part of this Act (*f*), includes interests arising under contract and other equitable interests; and the intention of this Act is, that without prejudice to the provisions of this Act for preventing notice of trusts from being entered in the register book or received by the registrar, and without prejudice to the powers of disposition and of giving receipts conferred by this Act on registered owners and mortgagees, and without prejudice to the provisions of this Act relating to the exclusion of unqualified persons from the ownership of British ships, interests arising under contract or other equitable interests may be enforced by or against owners and mortgagees of ships in respect of their interest therein in the same manner as in respect of any other personal property.

In *Lacon v. Liffen* (*g*) a registered mortgagee of a ship deposited with a banker the instrument of mortgage thereof, and subsequently became bankrupt. It was held that such deposit took the ship out of the order and disposition of the bankrupt and constituted the creditor equitable mortgagee of the ship.

Although equitable interests in ships are recognized, a legal mortgage of a ship, in statutory form and registered, has priority over an equitable charge previously given, even where the legal mortgagee takes with notice of the charge (*h*).

But where a first mortgage is executed to secure a current account and duly registered, the general principle (*i*) that a first

(*e*) See also sub-sects. 2 and 3 of this section.

(*f*) Part I.—Registry.

(*g*) (1863), 32 L. J. Ch. 315.

(*h*) *Black v. Williams*, [1895] 1 Ch. 408. See also *The Celtic King*, [1894] P.

175.

(*i*) See p. 716, *supra*.

mortgagee whose mortgage is taken to cover future advances cannot claim, in priority to a second mortgagee, the benefit of the security in respect of advances made after he received notice of the second mortgage will apply (*k*).

A mortgage of a ship, although not made or registered in accordance with the Merchant Shipping Act, is nevertheless outside the Bills of Sale Acts (*l*).

Deposit of Builder's Certificate of Unfinished Ship.—In *Ex parte Hodgkin, In re Softley* (*m*), S., a shipbuilder, in August, 1874, his account current with his bankers being then overdrawn, offered to give them security upon a ship which he was building. The bankers declined to accept the security then, but said that circumstances might arise to make it desirable that they should have it, and he promised to give it them when they wished it. On the 28th of September the offer was renewed, but the bankers urged him to sell the ship, and so prevent the necessity of their taking the security. On the 7th of October, S. had an interview with them at the bank, and they told him that they would accept the security, and that he was to lodge the builder's certificate of the ship with their manager. The next day he signed the certificate, and gave it to the bank manager. The certificate described the ship and her engines, and stated that she had been built for the bank manager. At this time she was not launched, but was in an unfinished state in the builder's yard. The engines were not on board, but were lying unfinished in the yard of the firm who were making them for the shipbuilder. On the 9th of October the shipbuilder had another interview with the bankers, when they told him they could advance him no more money, and did not see how he could go on, to which he assented; but they agreed to advance him 770*l.* to pay his workmen's weekly wages, on the security of an assignment of a debt owing to him from another person, and told him that they could go no further, and that he had better consult his solicitor as to his position. On the 10th of October the manager endeavoured to get himself registered as the

(*k*) *The Benwell Tower* (1895), 72 L. T. 664. Cf. *Liverpool Marine Credit Co. v. Wilson*, cited at p. 737, *supra*.

(*l*) See 41 & 42 Vict. c. 31, s. 4; 45 &

46 Vict. c. 43; *Union Bank of London v. Lenanton* (1878), 3 C. P. D. 243.

(*m*) (1875), 20 Eq. 746.

owner of the ship, but, as she was not launched, this could not be done. He, however, placed a man in possession of her, and fixed a notice upon her that she was his property. On the 10th of October S. paid his workmen, and then discharged them, and closed his place of business. On the 12th of October he filed a liquidation petition. It was held that both the securities given to the bankers were valid as against the trustee in the liquidation, there not being in the transactions anything amounting to either a fraudulent preference or an act of bankruptcy; that the deposit of the builder's certificate created a good equitable mortgage of the unfinished ship, including the engines which were being built for her, subject, as to the engines, to any lien for unpaid purchase-money to which the engine-builders might be entitled; but that the assignment of the debt having been given after the insolvent position of S. was disclosed, was a security for the 770*l.* only, and could not be made available by consolidation or otherwise to secure the past debt.



SECTION III.

GOODS.

*Mortgages.*

A mortgage of goods—as distinguished from a pledge, where the possession is given—may be created by deed, so as to pass the legal ownership to the mortgagee subject to the mortgagor's right of redemption (*n*). Upon default, the mortgagee has a right of sale, subject to reasonable notice to the mortgagor (*o*).

Mortgages of goods differ widely from mortgages of lands and houses as regards the considerations which arise as to their validity. This is owing chiefly to the provisions of the Bills of Sale Acts.

Bills of Sale.—A document by which the title to a chattel is transferred is a bill of sale. But if the transfer can be proved

(*n*) *Kemp v. Westbrook* (1749), 1 Ves.
sen. 278.

(*o*) *Tucker v. Wilson* (1714), 1 P. Wms.

261; *Carter v. Wake* (1877), 4 Ch. D.
605; *Deverges v. Sandeman, Clark & Co.*,
[1902] 1 Ch. 579.

without the production of a bill of sale, the provisions of the Acts are immaterial, in so far that, although they may not have been complied with, the title of the transferee is valid (*p*).

"The following propositions are established First, the Bills of Sale Acts strike at, not transactions, but documents: *North Central Wagon Company v. Manchester, Sheffield and Lincolnshire Railway Company* (*q*). Secondly, if there be a document at all, it must, unless falling within the stated exceptions, be expressed in the statutory form; and it is no answer to say that the transaction cannot be so expressed: *Ex parte Parsons* (*r*). Thirdly, the Acts have no application to a pledge as distinguished from an assurance: *Ex parte Hubbard* (*s*), where *Ex parte Close* (*t*) is quoted with approval. Fourthly, delivery, which is essential to a pledge, may be effected without physical change of possession of the goods: *Mills v. Charlesworth* (*u*). Fifthly, the Acts have no application to a case where the right to possession can be proved by parol without reference to any document: *Newlove v. Shrewsbury* (*x*). Sixthly, if the right can be so proved, the co-existence of a document recording the transaction and not expressed in the statutory form does not vitiate it: *Mills v. Charlesworth*" (*y*).

We are here concerned with dispositions of goods by way of security for loans, and, accordingly, the Bills of Sale Act (1878) Amendment Act, 1882, has to be considered as well as the principal Act itself (*z*).

Definitions.—*A bill of sale* is a document whereby the holder or grantee has power, either with or without notice, and either

(*p*) *Woodgate v. Godfrey* (1879), 5 Ex. D. 24; *Manchester, &c. Rail. Co. v. North Central Wagon Co.* (1888), 13 A. C. 554; *Newlove v. Shrewsbury* (1888), 21 Q. B. D. 41; *Charlesworth v. Mills*, [1892] A. C. 231; *Ramsay v. Margrett*, [1894] 2 Q. B. 18; *London and Yorkshire Bank v. White* (1895), 11 T. L. R. 570. See also *In re Hall, Ex parte Close* (1884), 14 Q. B. D. 386; 54 L. J. Q. B. 43 (discussed in the cases referred to in note (*l*) on p. 751, *infra*); but it is doubtful whether the decision in this case would apply to a mortgage, as distinguished from a pledge, of chattels

for money lent since the Act of 1882.

(*q*) (1887), 35 Ch. D. 191; (1888), 13 A. C. 554.

(*r*) (1886), 16 Q. B. D. 532.

(*s*) (1886), 17 Q. B. D. 690.

(*t*) (1884), 14 Q. B. D. 386.

(*u*) (1890), 25 Q. B. D. 421.

(*x*) (1888), 21 Q. B. D. 41.

(*y*) Per Kekewich, J., in *Grigg v. National Guardian Assurance Co.*, [1891] 3 Ch. 206, at p. 210. See further upon this subject, pp. 749—751, *infra*.

(*z*) Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43), s. 3.

immediately or at any future time, to seize or take possession of any personal chattels comprised in or made subject to it (a). The term is further defined in the Act of 1878 as follows:—

4. The expression “bill of sale” shall include bills of sale, assignments, transfers, declarations of trust without transfer, inventories of goods with receipt thereto attached, or receipts for purchase-moneys of goods, and other assurances of personal chattels, and also powers of attorney, authorities, or licenses to take possession of personal chattels as security for any debt, and also any agreement, whether intended or not to be followed by the execution of any other instrument, by which a right in equity to any personal chattels, or to any charge or security thereon, shall be conferred, but shall not include the following documents; that is to say, assignments for the benefit of the creditors of the person making or giving the same, marriage settlements, transfers or assignments of any ship or vessel or any share thereof, transfers of goods in the ordinary course of business of any trade or calling, bills of sale of goods in foreign parts or at sea, bills of lading, India warrants, warehouse-keepers’ certificates, warrants or orders for the delivery of goods, or any other documents used in the ordinary course of business as proof of the possession or control of goods, or authorizing or purporting to authorize, either by indorsement or by delivery, the possessor of such document to transfer or receive goods thereby represented.

6. Every attornment, instrument, or agreement, not being a mining lease, whereby a power of distress is given or agreed to be given by any person to any other person by way of security for any present, future, or contingent debt or advance, and whereby any rent is reserved or made payable as a mode of providing for the payment of interest on such debt or advance, or otherwise for the purpose of such security only, shall be deemed to be a bill of sale, within the meaning of this Act, of any personal chattels which may be seized or taken under such power of distress.

Provided, that nothing in this section shall extend to any mortgage of any estate or interest in any land, tenement, or hereditament which the mortgagee, being in possession, shall have demised to the mortgagor as his tenant at a fair and reasonable rent (b).

(a) Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 3.

(b) See *In re Willis, Ex parte Kennedy*

(1888), 21 Q. B. D. 384; *Mumford v. Collier* (1890), 25 Q. B. D. 279; *Green v. Marsh*, [1892] 2 Q. B. 330.

The definition is continued in the later Acts as follows :—

Bills of Sale Act (1878) Amendment Act, 1882 :

17. Nothing in this Act shall apply to any debentures issued by any mortgage, loan, or other incorporated company, and secured upon the capital stock or goods, chattels, and effects of such company.

Bills of Sale Act, 1891 (c) :

1. An instrument charging or creating any security on or declaring trusts of imported goods given or executed at any time prior to their deposit in a warehouse, factory, or store, or to their being reshipped for export, or delivered to a purchaser not being the person giving or executing such instrument, shall not be deemed a bill of sale within the meaning of the Bills of Sale Acts, 1878 and 1882.

Personal Chattels are defined as follows :—

Bills of Sale Act, 1878 :

4. The expression “personal chattels” shall mean goods, furniture, and other articles capable of complete transfer by delivery, and (when separately assigned or charged) fixtures and growing crops, but shall not include chattel interests in real estate, nor fixtures (except trade machinery as hereinafter defined), when assigned together with a freehold or leasehold interest in any land or building to which they are affixed (*d*), nor growing crops when assigned together with any interest in the land on which they grow, nor shares or interests in the stock, funds, or securities of any government, or in the capital or property of incorporated or joint stock companies, nor choses in action, nor any stock or produce upon any farm or lands which by virtue of any covenant or agreement or of the custom of the country ought not to be removed from any farm where the same are at the time of making or giving of such bill of sale.

5. Trade machinery shall, for the purposes of this Act, be deemed to be personal chattels, and any mode of disposition of trade machinery by the owner thereof which would be a bill

(c) 54 & 55 Vict. c. 35.

(d) See *Small v. National Provincial Bank of England*, [1894] 1 Ch. 686; *In re Brooke, Brooke v. Brooke*, [1894] 2

Ch. 600; *Johns v. Ware*, [1899] 1 Ch. 359; *West London Syndicate v. Inland Revenue Commissioners*, [1898] 2 Q. B. 507, at p. 532.

of sale as to any other personal chattels shall be deemed to be a bill of sale within the meaning of this Act (e).

7. No fixtures or growing crops shall be deemed, under this Act, to be separately assigned or charged by reason only that they are assigned by separate words, or that power is given to sever them from the land or building to which they are affixed, or from the land on which they grow, without otherwise taking possession of or dealing with such land or building, or land, if by the same instrument any freehold or leasehold interest in the land or building to which such fixtures are affixed, or in the land on which such crops grow, is also conveyed or assigned to the same persons or person.

Form.—A bill of sale given as a security for a loan must be in substantial accordance with the following form (f) :—

THIS INDENTURE, made the day of , between A. B., of , of the one part, and C. D., of , of the other part, Witnesseth that in consideration of the sum of £ now paid to A. B. by C. D., the receipt of which the said A. B. hereby acknowledges [*or whatever else the consideration may be*], he the said A. B. doth hereby assign unto C. D., his executors, administrators, and assigns, All and singular the several chattels and things specifically described in the schedule hereto annexed by way of security for the payment of the sum of £ , and interest thereon at the rate of per cent. per annum [*or whatever else may be the rate*]. And the said A. B. doth further agree and declare that he will duly pay to the said C. D. the principal sum aforesaid, together with the interest then due, by equal payments of £ on the day of [*or whatever else may be the stipulated times or time of payment*]. And the said A. B. doth also agree with the said C. D. that he will [*here insert terms as to insurance, payment of rent, or otherwise, which the parties may agree to for the maintenance or defeasance of the security*].

Provided always, that the chattels hereby assigned shall not be liable to seizure or to be taken possession of by the said C. D. for any cause other than those specified in section seven of the Bills of Sale Act (1878) Amendment Act, 1882.

In witness, &c.,

Signed and sealed by the said A. B.

in the presence of me, E. F.

[*Add witness' name, address, and description.*]

(e) Trade machinery is defined in this section.

(f) Bills of Sale Act (1878) Amendment Act, 1882, s. 9, and Schedule.

The bill of sale must have attached to it a schedule specifically describing the chattels comprised in it (*g*). The consideration must not be less than 30*l.* (*h*) and must be truly stated (*i*). It must be attested and registered at the Central Office of the Supreme Court within seven days from its execution (*i*). An affidavit stating the date of making the bill of sale, the residence and occupation of the grantor and of the attesting witness or witnesses, and its due making and attestation, must be filed at the same time (*k*). This affidavit must not be sworn before the solicitor of either the grantor (*l*) or the grantee (*m*). The registration must be renewed every five years (*n*).

The chattels assigned by the bill of sale are liable to seizure by the grantee only for one or other of the following causes:— (1) default on the part of the grantor in payment, or in the performance of any covenant or agreement in the bill necessary for maintaining the security; (2) the bankruptcy of the grantor or the distraint of the goods for rent, rates or taxes; (3) the fraudulent removal of the goods by the grantor; (4) non-production on the written demand of the grantee of the grantor's last receipts for rent, rates and taxes, without reasonable excuse; (5) an execution levied against the goods of the grantor (*o*).

The chattels must not be removed or sold until after the expiration of five clear days from the day when they were seized or taken possession of under the bill of sale (*p*).

On seizure for any of these causes the grantor may within five days apply to the Court, and the Court, if satisfied that, by payment of money or otherwise, the cause of seizure no longer exists, may restrain the grantee from removing or selling the goods, or make such other order as may seem just (*o*).

In case two or more bills of sale are given, comprising in whole or in part any of the same chattels, they will have priority in the

(*g*) Bills of Sale Act (1878) Amendment Act, 1882, s. 4. See *Carpenter v. Deen* (1889), 23 Q. B. D. 566.

(*h*) *Ibid.* s. 12.

(*i*) *Ibid.* s. 8.

(*k*) Bills of Sale Act, 1878, ss. 10 (2), 17; Act of 1882, s. 11.

(*l*) R. S. C. Ord. 38, r. 16.

(*m*) *Baker v. Ambrose*, [1896] 2 Q. B. 372.

(*n*) Bills of Sale Act, 1878, s. 11.

(*o*) Act of 1882, s. 7.

(*p*) *Ibid.* s. 13.

order of the date of their registration respectively as regards such chattels (*r*).

A transfer or assignment of a registered bill of sale need not be registered (*r*).

Bills of sale given for purposes other than that of a security for a loan are upon a distinct footing, as they are governed by the Act of 1878, and not by that of 1882.

If a document purports to give a security upon goods for the repayment of money, and, although a bill of sale within the meaning of the Acts, is not in the prescribed form, it is altogether void, even against the grantor himself (*s*).

A bill of sale in the prescribed form, and as to which the necessary formalities have been observed, will have effect only in respect of the chattels specifically described in the schedule, and will be void, except as against the grantor, in respect of any chattels not so specifically described (*t*), and also in respect of any chattels of which the grantor was not the true owner at the time of its execution (*u*), subject to the qualification that the foregoing provisions do not render a bill of sale void in respect of any growing crops separately assigned or charged where they are actually growing at the time when the bill of sale is executed, or in respect of any fixtures separately assigned or charged, and any plant or trade machinery which are used in, attached to, or brought upon any land, farm, factory, workshop, shop, house, warehouse, or other place in substitution for any of the like fixtures, plant, or trade machinery, specifically described in the schedule to such bill of sale (*x*).

Pledges.

A pledge or pawn is the actual or constructive delivery of goods by a debtor into the possession of his creditor as a security for the debt. The general property in the goods remains in the pledgor;

(*r*) Bills of Sale Act, 1878, s. 10.

(*s*) *Thomas v. Kelly* (1888), 13 A. C. 506; *Davies v. Rees* (1886), 17 Q. B. D. 408, at p. 412; *In re Burdett, Ex parte Byrne* (1888), 20 Q. B. D. 310 (in which the

last-mentioned case was distinguished). See also *Griffin v. Union Deposit Bank* (1887), 3 T. L. R. 608.

(*t*) Act of 1882, s. 4.

(*u*) *Ibid.* s. 5.

(*x*) *Ibid.* s. 6.

the pledgee has only a special property or right of detaining the goods for his security until payment of the debt (y).

"A pawn differs, on the one hand, from a lien, which conveys no right to sell whatever, but only a right to retain until the debt in respect of which the lien was created has been satisfied, and which passes no property; and on the other hand, from a mortgage, which conveys the entire property of the thing mortgaged to the mortgagee conditionally, so that when the condition is broken the property remains absolutely in the mortgagee; whereas a pawn never conveys the general property to the pawnee, but only a special property in the thing pawned; and the effect of a default in payment of the debt by the pawnor is, not to vest the entire property of the thing pledged in the pawnee, but to give him a power to dispose of it, accounting for the surplus; and if he neglects to use this power, the general property of the thing pawned continues in the pawnor, who has a right at any time to redeem it" (z).

The delivery of the goods, which is essential to the constitution of a pledge, may be either actual or constructive.

There will be a constructive delivery where, the goods being of considerable bulk, the key of the warehouse in which they are contained is delivered, or where the bill of lading of goods at sea, or the dock warrant for goods, is delivered.

So where goods imported from England into Quebec, consigned to M. and S., and stored in the Customs warehouse there, according to the Customs regulations for freight, duties and storage, were by a written contract hypothecated by M. and S. for advances made to them by G. and K., and a note was entered in the book of the chief officer of the Customs, specifying the conditions upon which the loan was made, with a request to such officer to hold the goods subject to the orders of G. and K., they paying the duty and storage charges before removal, it was held by the Judicial Committee of the Privy Council that there had been a valid constructive delivery of the property (a).

(y) *Jones v. Smith* (1794), 2 Ves. jun. 372, at p. 378; *Lickbarrow v. Mason* (1787), 2 T. R. 63; *Martin v. Reid* (1862), 11 C.B.N.S. 730; *Donald v. Suckling* (1866), L. R. 1 Q. B. 585, at p. 604.

(z) *Smith's L. C.* 11th ed. Vol. 1, p. 199. Cf. *Halliday v. Holgate* (1868), L. R. 3 Ex. 299, at p. 302.

(a) *Young v. Lambert* (1870), L. R. 3 P. C. 142. See also pp. 754—762, *infra*.

So the delivery of part may be a constructive delivery of the whole. But "the delivery of part operates as a constructive delivery of the whole only where the delivery of part takes place in the course of the delivery of the whole, and the taking possession by the buyer of that part is the acceptance of constructive possession of the whole" (b).

Moreover, as the right of the pledgee arises from the delivery of possession to him, its continuance depends upon his retention of possession.

In *Babcock v. Lawson* (c) D. & Co. deposited certain goods with the plaintiffs as security for an advance; they afterwards obtained possession of the goods by fraudulently representing to the plaintiffs that they had sold them to the defendants, and would hand over to the plaintiffs the money to be received in payment. D. & Co. obtained an advance from the defendants, and deposited the goods with them, giving a power of sale. It was held that, as the plaintiffs had parted with their special property in the goods to D. & Co., they could not recover them in an action from the defendants, who had obtained them *bonâ fide* and for a good consideration.

A pledgee may, however, redeliver the goods to the pledgor for a limited purpose without thereby losing his rights under the contract of pledge against the pledgor himself or his creditors.

In *North Western Bank v. Poynter, Son and Macdonalds* (d) the pledgors of a bill of lading representing a specific cargo were under contract to sell a larger quantity of like goods to third parties. The pledgees, the bank, returned the bill of lading to the pledgors to obtain delivery of the merchandise and sell on the pledgees' behalf, and account for the proceeds towards satisfaction of the debt. It was held that the pledgees' security was not affected, and that they were entitled to the proceeds of the cargo as against general creditors of the pledgors who had attached them.

If a transaction be only one of pledge arising from a delivery by one party to the other of the possession of his goods as a

(b) Per Willes, J., in *Bolton v. Lancashire and Yorkshire Rail. Co.* (1866), L. R. 1 C. P. 431, at p. 440.

(c) (1880), 5 Q. B. D. 284.

(d) [1895] A. C. 56.

security for the money advanced, it is immaterial that the terms upon which those goods are pledged are reduced to writing. This does not make it a bill of sale (e).

In *Charlesworth v. Mills* (f) the owner of household goods which had been seized under a *fi. fa.* agreed verbally with an auctioneer that, in consideration of his paying out the sheriff, the auctioneer should hold possession of the goods, sell them by auction and pay over the balance, if any, to the owner. This agreement was reduced into writing and the sheriff was paid out, the man in possession remaining in possession for the auctioneer. It was held that since the written agreement did not constitute the auctioneer's title, and was not intended to and did not come into operation until possession had been actually transferred from the sheriff to the auctioneer, it was not an "assurance" or a "licence to take possession," or in any other respect a bill of sale within the Bills of Sale Acts, 1878 and 1882.

In *Grigg v. National Guardian Assurance Co.* (g) the plaintiff applied verbally to the defendants for a loan, offering as security certain furniture of his then at a warehouse in his name. The defendants made the loan to the plaintiff, who gave them a promissory note for the amount, and also signed a memorandum by which he agreed to pay interest on the amount of the note if not paid by the stipulated time. On the same day the plaintiff signed and handed to the warehouseman a delivery order, requesting him to "deliver" to the defendants or their order "all property warehoused with you in my name on payment of your charges." It was held that the delivery order was not a "bill of sale" within the Bills of Sale Acts, 1878 and 1882, the whole transaction being one of pledge, and the effect of the delivery order being equivalent to actual possession by the defendants, the pledgees.

In *Morris v. Delobel-Flipo* (h), by an agreement in writing made between the defendant, a foreign manufacturer, and the plaintiff, his agent in England, it was provided that advances made by the plaintiff for expenses should be "covered and secured

(e) *Ex parte Hubbard, In re Hardwick* (1886), 17 Q. B. D. 690; and per Lord Herschell in *Charlesworth v. Mills*, [1892] A. C. 231, at p. 243.

(f) See last note.

(g) [1891] 3 Ch. D. 206, cited at p. 742, *supra*.

(h) [1892] 2 Ch. 352.

by the stock of goods which shall be in his hands," which the defendant bound himself should not fall below a certain value. The defendant terminated the agency, and asserted the right to remove the goods remaining in the plaintiff's hands without satisfying his claims for the expenses of the agency, upon the ground that the agreement conferred a right in equity to, or created a security upon, the goods, and, not having been registered as a bill of sale, was void. In an action by the plaintiff for wrongful dismissal, it was held (1) that the agreement did not empower the plaintiff to seize any goods, but merely entitled him to retain possession of goods after they had come into his hands; (2) that when the goods had come into his hands there was an agreement coupled with possession which created a legal and not an equitable right, and consequently that, according to the principle of *Reeves v. Barlow* (i) and *Ex parte Hubbard* (k), the agreement was not void as a bill of sale within the meaning of the Bills of Sale Act, 1882 (l).

Right of Pledgee.—Where a day has been appointed in the contract of pledge for repayment, upon default, the pledgee may sell the goods pledged. Where no time has been so fixed, he may sell upon default after a notice given by him to the pledgor requiring payment and giving a reasonable opportunity for compliance therewith (m). It is desirable, though not necessary, that a day for payment should be expressly fixed in the notice (n).

Except by a sale properly effected, the pledgee cannot pass to another a better title to the goods than he himself has (o).

(i) (1884), 12 Q. B. D. 436.

(k) (1886), 17 Q. B. D. 690.

(l) See also *In re Cunningham & Co.*, *Attenborough's Case* (1885), 28 Ch. D. 682; 54 L. J. Ch. 448; *In re Hall*, *Ex parte Close* (1884), 14 Q. B. D. 386; disapproved in *Ex parte Parsons*, *In re Townsend* (1886), 16 Q. B. D. 532; but quoted with approval in *Ex parte Hubbard*, *In re Hardwick* (1886), 17 Q. B. D. 690.

(m) *France v. Clark* (1883), 22 Ch. D. 830, at p. 833; (1884), 26 Ch. D. 257; per Fry, L. J., in *In re Richardson*, *Shillito v. Hobson* (1885), 30 Ch. D. 396,

at p. 403; per Bowen, L. J., in *Ex parte Hubbard*, *In re Hardwick* (1886), 17 Q. B. D. 690, at p. 698; per Cotton, L. J., in *In re Morritt*, *Ex parte Official Receiver* (1887), 18 Q. B. D. 222, at p. 233; *Deverges v. Sandeman, Clark & Co.*, [1902] 1 Ch. 579. See also per Gibbs, C. J., in *Pothonier v. Dawson* (1816), 1 Holt, 383, at p. 385; *Martin v. Reid* (1862), 11 C. B. N. S. 730; *Pigot v. Cubley* (1864), 15 C. B. N. S. 701.

(n) Per Stirling, L. J., in *Deverges v. Sandeman, Clark & Co.* (see last note), at p. 593 of the report.

(o) *Demainbray v. Metcalfe* (1715), 2

The pledgee is not entitled to foreclosure (*p*).

Duty of Pledgee.—The pledgee must exercise ordinary care of the goods pledged as long as his right of retention continues. After repayment or tender they are at his risk until returned to the pledgor (*q*).

Redemption.—The pledgor is entitled to redeem the thing pledged upon payment of the debt at the appointed time, or afterwards, so long as the thing remains in the possession of the pledgee (*r*).

If the pledgor tenders to the pledgee the amount due on the security, and the pledgee refuses to accept it, his special property in the goods is determined, and the pledgor can maintain an action in respect of the detention of the goods (*s*).

The mere fact that the pledgee asserts that the subject of the pledge belongs to him in full ownership does not amount to a waiver of tender, so as to divest the special property of the pledgee without a tender (*t*).

Hypothecation.—Where property is charged with the amount of a debt, but neither ownership nor possession is passed to the creditor, it is said to be hypothecated; as, for example, where a borrower, being entitled to goods in the hands of a third person, or prospectively entitled to property not yet in existence, gives the creditor a right of sale, and of appropriating the proceeds in satisfaction of his debt, in the event of non-payment (*u*).

Vern. 691; *Hartop v. Hoare* (1743), 3 Atk. 44; *Pickering v. Busk* (1812), 15 East, 38.

(*p*) *Carter v. Wake* (1877), 4 Ch. D. 605. Cf. Sect. 5 of this chapter.

(*q*) Per Lord Holt in *Coggs v. Bernard* (1704), 2 Ld. Raym. 909.

(*r*) *Kemp v. Westbrook* (1749), 1 Ves. sen. 278; *Martindale v. Smith* (1841), 1 Q. B. 389; per Cotton, L. J., in *In re Morritt, Ex parte Official Receiver* (1887), 18 Q. B. D. 222, at p. 233. See, however, as to pawnbrokers, the Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93).

(*s*) *Bank of New South Wales v. O'Connor* (1889), 14 A. C. 273, at

p. 282; *Yungmann v. Briesmann*, W. N. (1892) 162. See also *Halliday v. Holgate* (1868), L. R. 3 Ex. 299. The case of *Demainbray v. Metcalfe* (1715), 2 Vern. 691, referred to in 1 Eq. Ab. at p. 9—where a banker having lent 200*l.* on a pledge of jewels and afterwards a further sum on a note, the pledgor was not admitted to redeem the jewels without payment of the note likewise—cannot be considered authoritative.

(*t*) *Yungmann v. Briesmann*, see last note.

(*u*) See, e.g., *Reg. v. Townshend* (1884), 15 Cox, 466; *Bristol and West of England Bank v. Midland Rail. Co.*, [1891] 2 Q. B. 653, cited at p. 757, *infra*.

Sometimes the word is used in a comprehensive sense to denote any form of charge to secure the repayment of an advance.

The word has hardly become a term of art in the common law. It represents rather a conception of Roman jurisprudence.

In *Ex parte North Western Bank, In re Slee* (x), A., being a factor and warehouse keeper, by letter of hypothecation pledged to the bank certain wools to secure a sum of money. No delivery of the warrants for the wools was made, but a promise to deliver them on the following morning was added at the foot of the letter. After being pressed daily to deliver the warrants, A. absconded. B. thereupon obtained from A.'s clerk the keys of the warehouses and possession of the wools. A. was a few days afterwards adjudicated bankrupt. The wools belonged to third parties, who had, however, been under advances from the bankrupt, and made no claim. It was held that the letter created a good equitable charge; that it did not require registration under the Bills of Sale Act of 1854; that the goods were not in the order and disposition of the bankrupt; that the transaction was a valid pledge under the Factors Act of 1842; and that B. had a good title against the trustee in bankruptcy.

In *Reg. v. Townshend* (y) T., a fruit broker, applied to his bankers for an advance as against certain goods which had been consigned to him and were then at sea, and deposited with them the indorsed bills of lading. Before making the advance the bankers required him to sign a letter of hypothecation, by which he undertook to hold the goods in trust for the bankers, and to hand over to them the proceeds "as and when received," to the amount of the advance.

It was held by Day, J., that this letter contained a declaration of an express trust such as would make the giver of it a trustee of the proceeds within the meaning of sect. 80 of the Larceny Act, and his appropriation of them to his own use an offence against that section; and, also, that such hypothecation note was a bill of sale within the definition in the Acts of 1878 and 1882, as being a declaration of trust without transfer; but that, the goods not having arrived at the date of its execution, it came within the

(x) (1872), 15 Eq. 69.

(y) (1884), 15 Cox, C. C. 466.

exception as to "goods at sea" contained in the Bills of Sale Acts, and so was not affected by the provisions of those Acts as to form and registration (z).

Transfer of Bill of Lading.

Where a bill of lading is indorsed to a banker as a security for money advanced by him, the transaction is generally in effect a pledge, though it may be a mortgage if the parties so intend. Whether it is the one or the other does not affect the substance of the rights of the parties (a).

The deposit of a bill of lading indorsed in blank as security for an advance will amount to a pledge (a).

The pledgee will have the right to obtain delivery of the goods, and, upon default by the borrower, to realize them (b).

If it be the intention of the parties, but not otherwise, the indorsement of a bill of lading will pass the absolute property in the goods represented by it (a).

A bill of lading of, or for, any goods, merchandise, or effects to be exported or carried coastwise requires a 6d. stamp (c). It may not be stamped after execution. Every person who makes or executes any bill of lading not duly stamped incurs a fine of 50l. (d).

Nature of Bill of Lading.—"The law," said Bowen, L. J. (e), "as to the indorsement of bills of lading is as clear as, in my opinion, the practice of all European merchants is thoroughly understood. A cargo at sea while in the hands of the carrier is necessarily incapable of physical delivery. During this period of transit and voyage, the bill of lading by the law merchant is universally recognized as its symbol, and the indorsement and delivery of the bill of lading operate as a symbolical delivery of the cargo. Property in the goods passes by such indorsement and

(z) See also *Ayers v. South Australian Banking Co.* (1871), L. R. 3 P. C. 548; *Lutscher v. Comptoir d'Escompte de Paris* (1876), 1 Q. B. D. 709.

(a) See *Sewell v. Burdick* (1884), 10 A. C. 74, especially per Lord Blackburn at pp. 96 and 103. Cf. also *In re Morritt* (1887), 18 Q. B. D. 222, at pp. 232, 235.

(b) *Sewell v. Burdick*, see last note, per Lord Selborne, at p. 82.

(c) Stamp Act, 1891 (54 & 55 Vict. c. 39), Schedule, "Bill of Lading."

(d) *Ibid.* s. 40.

(e) *Sanders v. Maclean* (1883), 11 Q. B. D. 327, at p. 341.

delivery of the bill of lading, whenever it is the intention of the parties that the property should pass, just as under similar circumstances the property would pass by an actual delivery of the goods. And for the purpose of passing such property in the goods and completing the title of the indorsee to full possession thereof, the bill of lading, until complete delivery of the cargo has been made on shore to someone rightfully claiming under it, remains in force as a symbol, and carries with it not only the full ownership of the goods, but also all rights created by the contract of carriage between the shipper and the shipowner. It is a key which in the hands of a rightful owner is intended to unlock the door of the warehouse, floating or fixed, in which the goods may chance to be. The above effect and power belong to any one of the set of original bills of lading which is first dealt with by the shipper. Except in furtherance of the title so created of the indorsee, the other originals of the set are, as against it, perfectly ineffectual and have no efficacy whatever, unless they are fraudulently used for the purposes of deceit" (*f*).

Accordingly, the efficacy of the bill of lading continues as to goods which, for the convenience of the parties, have been landed at a sufferance wharf (*g*), or which are subject to a stop order though landed on a wharf (*h*).

Transfer of One of a Set.—When goods are shipped under a bill of lading drawn in parts, to be delivered to the consignee "or his assigns, the one of which bills being accomplished, the others to stand void," the master, or the warehouseman who has the custody of the goods under the Merchant Shipping Act, is justified in delivering to the consignee on production of one part, although there has been a prior indorsement for value to the holder of another part; provided the delivery be *bonâ fide* and without notice or knowledge of such prior indorsement.

In *Glyn, Mills & Co. v. East and West India Dock Co.* (*i*) goods having been shipped for London consigned to C. & Co., the shipmaster signed a set of three bills of lading marked "First,"

(*f*) See also *Manchester Trust v. Furness*, [1895] 2 Q. B. 539, and the cases cited *infra*, on pp. 755—760.

(*g*) See 11 & 12 Vict. c. xviii. ; 25 &

26 Vict. c. 63, s. 67.

(*h*) *Barber v. Meyerstein* (1870), 4 E. & I. A. 317.

(*i*) (1882), 7 A. C. 591.

“Second” and “Third” respectively, making the goods deliverable to C. & Co., or their assigns, freight payable in London, the one of the bills being accomplished, the others to stand void. During the voyage, C. & Co. indorsed the bill of lading marked “First” to a bank in consideration of a loan. Upon the arrival of the ship at London the goods were landed and placed in the custody of a dock company in their warehouses, the master lodging with them notice under the Merchant Shipping Act, 1862, to detain the cargo until the freight should be paid. C. & Co. then produced to the dock company the bill of lading marked “Second” unindorsed, and the dock company entered C. & Co. in their books as proprietors of the goods. The stop for freight being afterwards removed, the dock company, *bonâ fide* and without notice or knowledge of the bank’s claim, delivered the goods to other persons upon delivery orders signed by C. & Co. It was held that the dock company had not been guilty of a conversion, and that the bank could not maintain any action against them.

“Everyone,” said Lord Selborne, L. C., “claiming as assignee under a bill of lading must be bound by its terms, and by the contract between the shipper of the goods and the shipowner therein expressed. The primary office and purpose of a bill of lading, although by mercantile law and usage it is a symbol of the right of property in the goods, is to express the terms of the contract between the shipper and the shipowner. It is for the benefit of the shipper that the right to take delivery of the goods is made assignable, and it is for the benefit and security of the shipowner that when several bills of lading, all of the same tenor and date, are given as to the same goods, it is provided that ‘the one of these bills being accomplished, the others are to stand void.’ It would be neither reasonable nor equitable, nor in accordance with the terms of such a contract, that an assignment, of which the shipowner has no notice, should prevent a *bonâ fide* delivery under one of the bills of lading, produced to him by the person named on the face of it as entitled to delivery (in the absence of assignment), from being a discharge to the shipowner. Assignment, being a change of title since the contract, is not to be presumed by the shipowner in the absence of notice, any more than a change of title is to be presumed in any other case when the original party to a

contract comes forward and claims its performance, the other party having no notice of anything to displace his right. He has notice indeed that an assignment is possible, but he has no notice that it has taken place. There is no proof of any mercantile usage putting the shipowner, in such a case, under an obligation to inquire whether there has in fact been an assignment or not; and, in the absence of such usage, I am of opinion that it is for the assignee to give notice of his title to the shipowner, if he desires to make it secure, and not for the shipowner to make any such inquiry."

But the person who first gets the bill of lading (though only one of a set of three) gets the property which it represents; he need not do any act to assert his title, which the transfer of the bill of lading of itself renders complete, and any subsequent dealings with the others of the set are subordinate to the rights passed by that one. Though the shipowner or wharfinger, having no notice of the transfer of one bill of lading, may be excused for delivering the goods to a person who produces to him another bill of lading which has in reality been subsequently taken, that does not affect the legal ownership of the goods as between the holders of the two bills of lading (*k*).

Unauthorized Delivery.—In *Bristol and West of England Bank v. Midland Railway Co.* (*l*), which was an action for wrongfully depriving the plaintiffs of goods, it appeared that the goods had been consigned to England from a colony. The bills of lading provided that the goods were to be delivered to the order of the consignor or his assigns. The consignor drew bills of exchange on the consignee against the consignment, and sold the bills of exchange, with the bills of lading annexed, which he had indorsed in blank, to a colonial bank, who sent them to a bank in London, with a hypothecation note empowering the London bank to sell the goods if the bills of exchange were not accepted or not paid at maturity. The goods arrived in England, and were delivered to the defendants, who were a railway company, to be delivered to the

(*k*) *Barber v. Meyerstein* (1870), 4 E. & I. A. 317. See also sects. 3 and 10 of the Factors Act, 1889, cited at pp. 765, 767, *infra*.

(*l*) [1891] 2 Q. B. 653.

order of the shipowners. The consignee paid the freight and other shipping charges and accepted the bills of exchange, but before the bills became due he induced the defendants wrongfully to deliver the goods to him without producing a delivery order from the shipowners. When the bills became due the consignee requested the plaintiffs to advance the money and take up the bills. They did so, and received the bills of exchange and the bills of lading from the London bank, and ultimately obtained delivery orders from the shipowners in exchange for the bills of lading. When they presented the delivery orders to the defendants they found that the goods had been already given up to the consignee, and they thereupon commenced the present action. It was held, first, that the plaintiffs must be taken to be pledgees of the goods, and had therefore a property sufficient to entitle them to maintain the action independently of the Bills of Lading Act; and, secondly, that the plaintiffs' right of action was not affected by the fact that at the date of the wrongful delivery they had not acquired their title to the goods.

Omission of "or Order or Assigns."—This omission from a bill of lading is not sufficient to give constructive notice of some equitable arrangement, between the person to whom it is made out and the consignors, to an indorsee who has obtained delivery of the goods from the person to whom the bill of lading is made out, so that the indorsee unites in himself a legal and an equitable title to the goods (*m*).

Liabilities in respect of Goods.—The mere indorsement and delivery of a bill of lading by way of pledge for a loan does not pass "the property in the goods" to the indorsee, so as to transfer to him all liabilities in respect of the goods within the meaning of the Bills of Lading Act (*n*).

In *Sewell v. Burdick* (*o*) goods were shipped to a foreign port under bills of lading making the goods deliverable to the shipper or assigns. After the goods had arrived and been warehoused, the shipper indorsed the bills of lading in blank and deposited them

(*m*) *Henderson & Co. v. Comptoir* L. R. 5 P. C. 501.

d'Escompte de Paris (1873), L. R. 5 P. C. 253. Cf. *Chartered Bank of India, Australia and China v. Henderson* (1874),

(*n*) 18 & 19 Vict. c. 111, s. 1.

(*o*) (1884), 10 A. C. 74.

with the indorsees as security for a loan. The indorsees never took possession of, or dealt with, the goods. It was held that "the property" in the goods did not "pass" to the indorsees within the meaning of the Bills of Lading Act so as to make them liable in an action by the shipowner for the freight.

"This appeal," said the Earl of Selborne, L. C., "raises the question whether, under the Bills of Lading Act of 1855 (18 & 19 Vict. c. 111), every holder of a bill of lading, indorsed in blank, who has taken it by way of security for an advance of money (and has not afterwards parted with it), is liable, by reason of such indorsement only, to an action for freight by the shipowner, although he may not have obtained delivery of the goods or derived any other benefit from his security. The goods in this case were, by the terms of the bill of lading, deliverable at Poti, a Russian port on the Black Sea, and had been landed and warehoused there in a public warehouse (no one appearing to claim or take charge of them) before the date of the indorsement. This was their position when the present action was brought by the respondent, the shipowner, against the appellants, who are bankers at Manchester, and who had advanced 300*l.* to the shipper upon the security of the bill of lading. In his statement of claim the plaintiff alleged that the goods still remained at Poti under the care of the Russian authorities; that the plaintiff had, under Russian law, no power of selling them for the purpose of paying himself the amount claimed in the action (174*l.* 8*s.* 9*d.* and interest); and that the Russian authorities were about to sell the same for a sum barely sufficient to cover the Customs duties and Government charges thereon. They were, in fact, sold by the Russian authorities, and did not realize more than the amount of those duties and charges. . . . In the present case the true question is whether 'the property' in the goods 'passed to the indorsee upon or by reason of the indorsement,' within the meaning of those words as used in the Bills of Lading Act of 1855? . . . Upon the whole I cannot dissemble that this case appears to me to be attended with some considerable difficulties. But those difficulties are mainly technical, arising out of a comparison of the language of the statute with various and not always consistent forms of expression found in authorities not decided with a view to any such consequences as

those which the statute would produce. They deal with questions between unpaid vendors of goods comprised in bills of lading and *bonâ fide* indorsees of the same bills of lading for value, or between competing and adverse claimants to priority as *bonâ fide* holders for value of the bills of lading themselves. The statute, on the other hand, deals with questions between shippers and indorsees of bills of lading claiming under them, and between indorsees and ship-owners. The preponderance of principle and reason appears to me to be against the proposition that, as between those parties, it can have been intended by, or can be the effect of, the statute to make the creditor of the shipper liable (in effect) as his surety to the shipowner (with whom he was never brought in contact), by reason only of the deposit with him, by way of security, of a bill of lading indorsed in blank; his right under that deposit being (whether at law or in equity) special and not general, and the shipper retaining (whether at law or in equity) the real and substantial property in the goods, subject to the security. It had not, until the present case, been directly or indirectly determined by any authority that such is the effect of the statute" (o).

Transfer of Warrants and Orders.

Effect of Transfer.—At common law "the transfer of a delivery order or dock warrant operated only as a token of authority to take possession, and not as a transfer of possession (p); and as between immediate parties, there is nothing to modify the common law rule. If, however, a buyer or mercantile agent, who is lawfully in possession of any document of title to goods, transfers it for value to a third person, the original seller's rights of lien and stoppage *in transitu* are thereby defeated" (q).

The modifications of the rule of the common law contained in the provisions of the Factors Act, 1889, and of the Sale of Goods Act, 1893, will be found below at pp. 764—769.

In *London and County Banking Co. v. Fulford* (r) the defendant

(o) Where a bill of exchange has been drawn and accepted against a bill of lading and a banker has become *bonâ fide* transferee of the latter, his rights will not be affected by the subsequent dishonour of the former: *Coventry v. Glad-*

stone (1867), 4 Eq. 493.

(p) *M^cEwan v. Smith* (1849), 2 H. L. C. 309.

(q) Chalmers' Sale of Goods Act, 1893, 5th ed. pp. 68-9.

(r) (1886), 2 T. L. R. 703.

gave to B. & Co. warrants signed by him for hides *ex* Anne Charlotte "held to order of B. & Co.," the warrants stating that they must be produced before the goods could be delivered. B. & Co. deposited the warrants with the plaintiffs to secure an advance. Prior to this deposit B. & Co. had obtained advances from S. & Co. upon the same hides, and the defendant having, on B. & Co.'s instructions, given to S. & Co. an acknowledgment that he held the hides to their order, had delivered the hides to S. & Co.'s order. In an action against the defendant for wrongful delivery of the hides, it was held that the defendant, by giving the warrants to B. & Co., had represented to the plaintiffs, through them, that he would continue to hold the goods to the order of B. & Co., and that he was liable to the plaintiffs accordingly.

Forged Alteration of Delivery Order.—In *Union Credit Bank v. Mersey Docks and Harbour Board*; *Same v. Same*; *Same v. Same and North and South Wales Bank* (s), it appeared that, in the first action, N. had pledged with the plaintiffs as security for an advance eighteen hogsheads of tobacco which were in the custody of the defendants as warehousemen. He subsequently repaid the advance on one of the hogsheads, and presented to the plaintiffs for their signature a delivery order on the defendants. On the order the place for the quantity was left blank. The plaintiffs signed the order, and N., having filled in the blank space with the words "eighteen hogsheads," obtained delivery of them all from the defendants, and then disposed of them. In an action against the defendants for the conversion of the seventeen hogsheads, it was held that the plaintiffs could not succeed, since they had impliedly given N. authority to fill up the blank in the delivery order, and were now estopped from showing that that authority was limited.

In the second action it appeared that N. had pledged with the plaintiffs two separate consignments of tobacco. He paid off the advance on one consignment, and presented to the plaintiffs a properly drawn delivery order in respect of it. They signed it, and N. subsequently added above their signature the description and distinguishing marks of the other consignment, and thus

(s) [1899] 2 Q. B. 205.

obtained from the defendants delivery of both consignments. It was held that an action for conversion would lie against the defendants, since the plaintiffs had not been guilty of any negligence which was the proximate cause of the wrongful delivery.

In the third action it appeared that N., after fraudulently obtaining the tobacco as above stated, had pledged it with the defendant bank as security for an advance, and, before the fraud was discovered, had repaid the advance and recovered possession of the tobacco. It was held that no action for conversion would lie against the defendant bank, since N.'s dealing with it had been concluded before the plaintiffs discovered the fraud (*t*).

Registration as Bill of Sale Unnecessary.—A warrant or order for the delivery of goods, like a bill of lading, is excluded from the statutory definition of a "bill of sale" (*u*).

Stamp Duty.—A *warrant for goods*, that is to say, any document or writing being evidence of the title of any person therein named, or his assigns, or the holder thereof, to the property in any goods, wares, or merchandise lying in any warehouse or dock, or upon any wharf, and signed or certified by or on behalf of the person having the custody of the goods, wares, or merchandise (and not being a document given by an inland carrier acknowledging the receipt of goods conveyed by him, or a weight note issued together with a duly stamped warrant, and relating solely to the same goods), requires a 3*d.* stamp, which may be adhesive; in which case it is to be cancelled by the person by whom the instrument is made, executed, or issued. Every one who makes, executes or issues, or receives or takes by way of security or indemnity, any warrant for goods not being duly stamped, incurs a fine of 20*l.* (*x*).

A *delivery order*, that is to say, any document or writing entitling, or intended to entitle, any person therein named, or his assigns, or the holder thereof, to the delivery of any goods, wares, or merchandise of the value of forty shillings or upwards,

(*t*) As to warrants and delivery orders, cf. also *Gunn v. Bolckow, Vaughan & Co.* (1875), 10 Ch. 491; *Imperial Bank v. London and St. Catherine Docks Co.* (1877), 5 Ch. D. 195; *Merchant Banking Co. of London v. Phoenix Bessemer Steel Co.*

(1877), 5 Ch. D. 205; *Barber v. Meyerstein*, cited at p. 757, *supra*.

(*u*) See pp. 743, 744, *supra*.

(*x*) Stamp Act, 1891, s. 111, and Schedule, "Warrant for Goods."

lying in any dock or port, or in any warehouse in which goods are stored or deposited on rent or hire, or upon any wharf, and signed by or on behalf of the owner of such goods, wares, or merchandise, upon the sale or transfer of the property therein, or not expressly stated therein not to have been given upon such a sale or transfer, requires a 1*d.* stamp, which may be adhesive; in which case it is to be cancelled by the person by whom the instrument is made, executed, or issued (*y*). In the absence of any special stipulation, the duty is to be paid by the person to whom the order is given; and any person from whom a delivery order chargeable with duty is required may refuse to give it, unless or until the amount of the duty is paid to him (*z*).

A person who untruly states, or knowingly allows it to be untruly stated, in a delivery order, that the transaction is not a sale or transfer of property, or that the goods are not of the value of forty shillings; or makes, signs, or issues a delivery order not duly stamped; or knowingly, either himself or by his servant or any other person, delivers, or procures or authorizes the delivery of, any goods mentioned in any delivery order which is not duly stamped, or which contains to his knowledge any such false statement as before mentioned, incurs a fine of 20*l.* But a delivery order is not, by reason of its being unstamped, to be deemed invalid in the hands of the person having the custody of, or delivering out, the goods therein mentioned, unless he is proved to have been party or privy to some fraud on the revenue in relation thereto (*a*).

The Power of Disposition.

“At common law,” said Blackburn, J., in *Cole v. North Western Bank* (*b*), “a person in possession of goods could not confer on another, either by sale or by pledge, any better title to the goods than he himself had. To this general rule there was an exception of sales in market overt, and an apparent exception where the person in possession had a title defeasible on account of fraud. But the general rule was that, to make either a sale or a pledge

(*y*) Stamp Act, 1891, s. 69, and
Schedule, “Delivery Order.”

(*z*) *Ibid.* s. 71.

(*a*) *Ibid.* s. 70.

(*b*) (1875), 10 C. P. 351, at p. 362.

valid against the owner of the goods sold or pledged, it must be shown that the seller or pledger had authority from the owner to sell or pledge, as the case might be. If the owner of the goods had so acted as to clothe the seller or pledger with apparent authority to sell or pledge, he was at common law precluded, as against those who were induced *bonâ fide* to act on the faith of that apparent authority, from denying that he had given such an authority, and the result as to them was the same as if he had really given it. But there was no such preclusion as against those who had notice that the real authority was limited. And the possession of bills of lading or other documents of title to goods did not at common law confer on the holder of them any greater power than the possession of the goods themselves."

Disposition by Mercantile Agents.—The statutory modifications of the law upon this subject are as follows.

The Factors Act, 1889 (*c*), provides—

1. For the purposes of this Act—

(1.) The expression "mercantile agent" shall mean a mercantile agent having in the customary course of his business as such agent authority either to sell goods, or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods (*d*).

(2.) A person shall be deemed to be in possession of goods, or of the documents of title to goods, where the goods or documents are in his actual custody, or are held by any other person subject to his control, or for him or on his behalf.

(3.) The expression "goods" shall include wares and merchandise.

(4.) The expression "document of title" shall include any bill of lading, dock warrant, warehouse-keeper's certificate, and warrant or order for the delivery of goods, and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorizing, or purporting to authorize, either by indorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented.

(5.) The expression "pledge" shall include any contract pledging or giving a lien or security on goods, whether in con-

(*c*) 52 & 53 Vict. c. 45.

(*d*) Cf. *City Bank v. Barrow* (1880), 5 A. C. 664, at p. 678.

sideration of an original advance or of any further or continuing advance, or of any pecuniary liability.

(6.) The expression "person" shall include any body of persons, corporate or unincorporate.

2.—(1.) Where a mercantile agent is, with the consent of the owner, in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition of the goods made by him when acting in the ordinary course of business of a mercantile agent shall, subject to the provisions of this Act, be as valid as if he were expressly authorized by the owner of the goods to make the same; provided that the person taking under the disposition acts in good faith, and has not at the time of the disposition notice that the person making the disposition has not authority to make the same (e).

(2.) Where a mercantile agent has, with the consent of the owner, been in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition which would have been valid if the consent had continued shall be valid notwithstanding the determination of the consent; provided that the person taking under the disposition has not at the time thereof notice that the consent has been determined.

(3.) Where a mercantile agent has obtained possession of any documents of title to goods by reason of his being or having been, with the consent of the owner, in possession of the goods represented thereby, or of any other documents of title to the goods, his possession of the first-mentioned documents shall, for the purposes of this Act, be deemed to be with the consent of the owner.

(4.) For the purposes of this Act the consent of the owner shall be presumed in the absence of evidence to the contrary.

3. A pledge of the documents of title to goods shall be deemed to be a pledge of the goods.

4. Where a mercantile agent pledges goods as security for a debt or liability due from the pledgor to the pledgee before the time of the pledge, the pledgee shall acquire no further right to the goods than could have been enforced by the pledgor at the time of the pledge.

5. The consideration necessary for the validity of a sale, pledge, or other disposition of goods in pursuance of this Act may be either a payment in cash, or the delivery or transfer of other goods, or of a document of title to goods, or of a negotiable security, or any other valuable consideration; but where goods

(e) A pledge by an agent of a negotiable instrument is valid at common law: *London Joint Stock Bank v. Simmons*, [1892] A. C. 201, and at pp. 217-8. See Sect. 4 of this chapter.

are pledged by a mercantile agent in consideration of the delivery or transfer of other goods, or of a document of title to goods, or of a negotiable security, the pledgee shall acquire no right or interest in the goods so pledged in excess of the value of the goods, documents, or security when so delivered or transferred in exchange.

6. For the purposes of this Act, an agreement made with a mercantile agent through a clerk or other person authorized in the ordinary course of business to make contracts of sale or pledge on his behalf shall be deemed to be an agreement with the agent.

7.—(1.) Where the owner of goods has given possession of the goods to another person for the purpose of consignment or sale, or has shipped the goods in the name of another person, and the consignee of the goods has not had notice that such person is not the owner of the goods, the consignee shall, in respect of advances made to or for the use of such person, have the same lien on the goods as if such person were the owner of the goods, and may transfer any such lien to another person.

(2.) Nothing in this section shall limit or affect the validity of any sale, pledge, or disposition by a mercantile agent.

8. Where a person, having sold goods, continues or is in possession of the goods or of the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge, or other disposition thereof, or under any agreement for sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorized by the owner of the goods to make the same.

9. Where a person, having bought or agreed to buy goods (e), obtains, with the consent of the seller, possession of the goods or the documents of title to the goods, the delivery or transfer, by that person or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge, or other disposition thereof, or under any agreement for sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same

(e) A hirer under a hire-purchase agreement comes within these words only if he is under a binding agreement

to buy the goods; a mere option to purchase does not bring a case within the Act: *Helby v. Matthews*, [1895] A. C. 471.

effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner (*f*).

In *Nicholson v. Harper* (*g*) a merchant sold wine stored in the cellars of a warehouseman to the plaintiffs. An order on the warehouseman for delivery of the wine to the plaintiffs was sent to them, but no notice of the purchase was given to the warehouseman. Subsequently the merchant signed a memorandum charging the wine as security for an advance made to him by the warehouseman. It was held that the latter conferred no title to the wine.

“In the present case,” said North, J., “the defendants were themselves in possession of the goods long before the sale, and have continued in the same position till the present time. There has been no alteration in that respect. I read the Act to mean that there must be a delivery of the goods by the seller in possession, or, where there is no delivery of the goods, the transfer of documents of title—well-known mercantile documents, defined by the Act by reference. That being so, in the present case there has been no delivery to the defendants since the sale at all, and no transfer of any documents of title; nor could there have been, for there were no such documents” (*h*).

10. Where a document of title to goods has been lawfully transferred to a person as a buyer or owner of the goods, and that person transfers the document to a person who takes the document in good faith and for valuable consideration, the last-mentioned transfer shall have the same effect for defeating any vendor's lien or right of stoppage *in transitu* as the transfer of a bill of lading has for defeating the right of stoppage *in transitu* (*i*).

11. For the purposes of this Act, the transfer of a document may be by indorsement, or, where the document is by custom or by its express terms transferable by delivery, or makes the goods deliverable to the bearer, then by delivery.

(*f*) This and the foregoing section are reproduced by sect. 25 of the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), except in so far that the words “or under any agreement for sale, pledge, or other disposition thereof,” following the words “sale, pledge, or other dis-

position thereof,” in each of these two sections are omitted.

(*g*) [1895] 2 Ch. 415.

(*h*) Cf. *Inglis v. Robertson*, [1898] A. C. 616.

(*i*) Cf. sect. 47 of the Sale of Goods Act, cited on p. 770, *infra*.

Documentary Bill.—Where a seller of goods sends to his buyer, under cover of a letter, a bill of lading accompanied by a draft to be accepted by the buyer for the price of the goods contained in the bill of lading, and the buyer keeps the bill of lading but refuses to accept the draft, he can yet give a good title to the goods covered by the bill of lading to a sub-purchaser or pledgee from him who takes in good faith and without notice of the want of authority of the buyer to deal with the bill of lading and the goods represented thereby. Such a transfer of the bill of lading will exclude the seller's right to stop the goods *in transitu* (k).

12.—(1.) Nothing in this Act shall authorize an agent to exceed or depart from his authority as between himself and his principal, or exempt him from any liability, civil or criminal, for so doing.

(2.) Nothing in this Act shall prevent the owner of goods from recovering the goods from an agent or his trustee in bankruptcy at any time before the sale or pledge thereof, or shall prevent the owner of goods pledged by an agent from having the right to redeem the goods at any time before the sale thereof, on satisfying the claim for which the goods were pledged, and paying to the agent, if by him required, any money in respect of which the agent would by law be entitled to retain the goods or the documents of title thereto, or any of them, by way of lien as against the owner, or from recovering from any person with whom the goods have been pledged any balance of money remaining in his hands as the produce of the sale of the goods after deducting the amount of his lien.

(3.) Nothing in this Act shall prevent the owner of goods sold by an agent from recovering from the buyer the price agreed to be paid for the same, or any part of that price, subject to any right of set-off on the part of the buyer against the agent.

13. The provisions of this Act shall be construed in amplification and not in derogation of the powers exercisable by an agent independently of this Act.

Stoppage in Transitu.

The Sale of Goods Act, 1893 (l), provides as follows:—

44. Subject to the provisions of this Act (m), when the buyer of

(k) *Cahn v. Pockett's Bristol Channel Steam Packet Co.*, [1899] 1 Q. B. 643.

(l) 56 & 57 Vict. c. 71.

(m) See sects. 45—47, *infra*.

goods becomes insolvent, the unpaid seller who has parted with the possession of the goods has the right of stopping them *in transitu*, that is to say, he may resume possession of the goods as long as they are in course of transit, and may retain them until payment or tender of the price.

45.—(1.) Goods are deemed to be in course of transit from the time when they are delivered to a carrier by land or water, or other bailee or custodian for the purpose of transmission to the buyer, until the buyer, or his agent in that behalf, takes delivery of them from such carrier or other bailee or custodian.

(2.) If the buyer or his agent in that behalf obtains delivery of the goods before their arrival at the appointed destination, the transit is at an end.

(3.) If, after the arrival of the goods at the appointed destination, the carrier or other bailee or custodian acknowledges to the buyer, or his agent, that he holds the goods on his behalf and continues in possession of them as bailee or custodian for the buyer, or his agent, the transit is at an end, and it is immaterial that a further destination for the goods may have been indicated by the buyer.

(4.) If the goods are rejected by the buyer, and the carrier or other bailee or custodian continues in possession of them, the transit is not deemed to be at an end, even if the seller has refused to receive them back.

(5.) When goods are delivered to a ship chartered by the buyer, it is a question depending on the circumstances of the particular case, whether they are in the possession of the master as a carrier, or as agent to the buyer.

(6.) Where the carrier or other bailee or custodian wrongfully refuses to deliver the goods to the buyer, or his agent in that behalf, the transit is deemed to be at an end.

(7.) Where part delivery of the goods has been made to the buyer, or his agent in that behalf, the remainder of the goods may be stopped *in transitu*, unless such part delivery has been made under such circumstances as to show an agreement to give up possession of the whole of the goods.

46.—(1.) The unpaid seller may exercise his right of stoppage *in transitu* either by taking actual possession of the goods, or by giving notice of his claim to the carrier or other bailee or custodian in whose possession the goods are. Such notice may be given either to the person in actual possession of the goods or to his principal. In the latter case the notice, to be effectual, must be given at such time and under such circumstances that the principal, by the exercise of reasonable diligence, may

communicate it to his servant or agent in time to prevent a delivery to the buyer.

(2.) When notice of stoppage *in transitu* is given by the seller to the carrier, or other bailee or custodian in possession of the goods, he must re-deliver the goods to, or according to the directions of, the seller. The expenses of such re-delivery must be borne by the seller.

47. Subject to the provisions of this Act (*n*), the unpaid seller's right of lien or retention or stoppage *in transitu* is not affected by any sale, or other disposition of the goods which the buyer may have made, unless the seller has assented thereto.

Provided that where a document of title to goods (*o*) has been lawfully transferred to any person as buyer or owner of the goods, and that person transfers the document to a person who takes the document in good faith and for valuable consideration, then, if such last-mentioned transfer was by way of sale, the unpaid seller's right of lien or retention or stoppage *in transitu* is defeated, and if such last-mentioned transfer was by way of pledge or other disposition for value, the unpaid seller's right of lien or retention or stoppage *in transitu* can only be exercised subject to the rights of the transferee (*p*).

48.—(1.) Subject to the provisions of this section, a contract of sale is not rescinded by the mere exercise by an unpaid seller of his right of lien or retention or stoppage *in transitu*.

(2.) Where an unpaid seller who has exercised his right of lien or retention or stoppage *in transitu* re-sells the goods, the buyer acquires a good title thereto as against the original buyer.

(3.) Where the goods are of a perishable nature, or where the unpaid seller gives notice to the buyer of his intention to re-sell, and the buyer does not within a reasonable time pay or tender the price, the unpaid seller may re-sell the goods and recover from the original buyer damages for any loss occasioned by his breach of contract.

(4.) Where the seller expressly reserves a right of re-sale in case the buyer should make default, and on the buyer making default re-sells the goods, the original contract of sale is thereby

(*n*) Sect. 25 (2), reproducing sect. 9 of the Factors Act, cited at p. 766, *supra*, with the omission after the words "sale, pledge, or other disposition thereof," of the words "or under any agreement for sale, pledge, or other disposition thereof."

(*o*) By virtue of sect. 62 of the Act, this expression has the same meaning as it has in the Factors Act: see p. 764, *supra*.

(*p*) Cf. sect. 10 of the Factors Act, cited at p. 767, *supra*.

rescinded, but without prejudice to any claim the seller may have for damages (*q*).

SECTION IV.

NEGOTIABLE INSTRUMENTS.

Negotiability.

A negotiable instrument is one which, when transferred by delivery or by indorsement and delivery, as the case may be, passes to the transferee a good title to payment according to its tenor, and irrespective of the title of the transferor, provided, in the case of a bill of exchange, promissory note or cheque, that he is a holder in due course (*r*), and, in the case of other instruments, that he is a *bonâ fide* holder for value without notice of any defect attaching to the instrument or the title of the transferor (*s*).

Negotiability in the above sense must be carefully distinguished from the mere quality of being subject to negotiation. Negotiation is the appropriate transfer of a bill, note, or cheque, by delivery or indorsement and delivery (*t*), and may take place where the instrument has lost the quality of negotiability in the first-mentioned sense, by reason of being overdue or otherwise.

Instruments not negotiable at one time may become so by virtue of the usage of the market (*u*), even though of recent origin (*x*).

An instrument that is negotiable by the law of a foreign country is not a negotiable instrument by the law of England, so as to give a *bonâ fide* holder for value a good title against an owner of the instrument, from whom it has been stolen, in the absence of any evidence of a custom of merchants in this country to treat it as negotiable (*y*).

(*q*) As to the subject of stoppage in *transitu*, see also pp. 760, 768, *supra*. *infra*.

(*r*) See pp. 787—788, *infra*.

(*s*) See pp. 777—787, *infra*.

(*t*) Bills of Exchange Act, s. 31.

(*u*) See cases cited on pp. 772—775,

(*x*) Per Bigham, J., in *Edelstein v. Schuler*, [1902] 2 K. B. 144, at p. 154; 7 Com. Cas. 172.

(*y*) *Picker v. London and County Banking Co.* (1887), 18 Q. B. D. 515.

Instruments which are Negotiable.

The following documents are negotiable :—

I. Bills of Exchange, Promissory Notes and Cheques (except in so far as they are restrictively indorsed, or have lost the character of negotiability by reason of being overdue or otherwise), and **Bank-Notes**.

II. Dividend Warrants (z).

III. Bonds payable to Bearer.

In *Gorgier v. Mierille* (a) it appeared that a Prussian bond had been deposited by the plaintiff with Agassiz & Co., to hold for his benefit and receive the interest upon it. Agassiz & Co. pledged the bond to the defendants, who did not know that Agassiz & Co. were not the owners of it. By the bond the King of Prussia declared himself and his successors bound to every person who should for the time being be the holder of the bond, for the payment of the principal and interest, in the manner therein pointed out. It was proved that bonds of this description were sold in the market and passed from hand to hand daily, like exchequer bills. A verdict for the defendants was upheld, Abbott, C. J., saying: "It" (the bond) "is . . . in its nature precisely analogous to a bank-note payable to bearer, or to a bill of exchange indorsed in blank. Being an instrument, therefore, of the same description, it must be subject to the same rule of law, that whoever is the holder of it, has power to give title to any person honestly acquiring it."

In *Venables v. Baring Brothers & Co.* (b) the facts were as follows: In 1873 an American railroad company employed B. & Co., a firm of bankers in London, as their agents for the issue of a series of bonds under their corporate seal. By each bond the company acknowledged itself to be indebted to two named trustees or "bearer" in a principal sum which would be due, and the company "would pay to the holder" of the bond, on the 1st of May, 1903, at the office of B. & Co.; and the company "further promised" to pay 6 per cent. interest half-yearly

(z) Bills of Exchange Act, s. 8 (4). the Act.

Cf. *Partridge v. Bank of England* (1846), (a) (1824), 3 B. & C. 45.

9 Q. B. 396. See also sect. 97 (3) (d) of (b) [1892] 3 Ch. 527.

at the said office in accordance with the annexed coupons, which were payable to "bearer." It was further stated, on the face of the bond, that it and the other bonds of the series were secured by a mortgage of even date made by the company to the trustees upon the company's railroad and property connected therewith. This mortgage contained various provisions for the protection of the bondholders, including a provision that, in case of default in payment of interest for ninety days, the principal on all the bonds should forthwith become due and payable. In 1883 some of the bonds were stolen from B. & Co.'s counting-house, and the firm immediately advertised the loss. In 1891 the agents in Paris of the plaintiff, a banker in London and Paris, advanced a sum of money to a customer who deposited with them as security some of the stolen bonds, neither the plaintiff nor his agents being at the time aware that the bonds had been stolen. B. & Co. subsequently gave notice to the plaintiff that they were stolen, and refused to pay the interest thereon, whereupon the plaintiff brought an action against them and the railroad company to establish his title to the bonds. It was held that the bonds were negotiable instruments according to the law merchant; and that, notwithstanding the advertisement of the loss, the plaintiff had not obtained them under such circumstances as to disentitle him to claim as a *bonâ fide* holder for value.

In *Bechuanaland Exploration Co. v. London Trading Bank* (c) the plaintiffs, a limited company, were possessed of certain debentures, issued by an English company in England and payable to bearer, which, by reason of the conditions indorsed thereon, were not promissory notes. These debentures were kept in a safe, the key of which was entrusted to the plaintiffs' secretary. The secretary, in fraud of the plaintiffs, took the debentures from the safe and pledged them with the defendants for advances made to him by them. The defendants received the debentures in good faith. It was proved that the usage in the mercantile world and on the Stock Exchange for many years had been to treat such debentures as negotiable instruments transferable by mere delivery. It was held that, although the plaintiffs were not estopped by their con-

duct from denying the defendants' title, yet the defendants were entitled to the debentures as against the plaintiffs on the ground that the debentures were negotiable instruments transferable by delivery.

In the course of his judgment, Mr. Justice Kennedy said: "The effect of the evidence as a whole was, in my view, that such debentures as these had for many years past been issued by English trading companies and circulated in the mercantile world as negotiable instruments passing from hand to hand accordingly. . . . It appears to me that, having regard to the decisions of the Exchequer Chamber in *Goodwin v. Roberts* (*d*) and of the Queen's Bench Division in *Rumball v. Metropolitan Bank* (*e*), if I have come, as I have, to the conclusion that there has been a sufficient proof of a mercantile usage to treat the debentures in question in this case as negotiable, I cannot refuse to follow these decisions; and these decisions, for the reasons which I have felt myself bound to state at length, appear to me practically to overrule the decision in *Crouch v. Crédit Foncier of England* (*f*), and to govern this case."

Accordingly, the time has now passed when the negotiability of bearer bonds, whether Government or trading, foreign or English, can be called into question in the English Courts. The existence of the usage in this respect has been so often proved, and its convenience is so obvious, that it must now be taken to be part of the law. It is no longer necessary to tender evidence in support of the fact that such bonds are negotiable. The Courts of law ought to take judicial notice of it (*g*).

IV. Scrip to Bearer.

Scrip issued in England by the agent of a foreign Government, by which the holder is to be entitled, on payment in full of the instalments due from him, to delivery by the agent of definitive bonds of the foreign Government on their arrival in this country, and which by the usage of bankers and dealers in public securities

(*d*) (1875), L. R. 10 Ex. 337; affirmed, (1876), 1 A. C. 476.

(*e*) (1877), 2 Q. B. D. 194.

(*f*) (1873), L. R. 8 Q. B. 374.

(*g*) *Edelstein v. Schuler*, [1902] 2 K. B. 144, 154; 7 Com. Cas. 172. See also

Sheffield v. London Joint Stock Bank, cited at p. 780, *infra*, and *London Joint Stock Bank v. Simmons*, cited at p. 782, *infra*.—As to stamp duty on foreign bonds certified in England, see *Revelstoke v. Inland Revenue Commissioners*, [1898] A. C. 565.

is transferred by mere delivery, passes by such delivery to a *bonâ fide* holder for value.

In *Goodwin v. Roberts* (*h*) such scrip had been bought by the plaintiff through one Clayton, a stockbroker, and had been allowed to remain in his hands. Clayton unlawfully pledged it with the defendants as security for a loan of money, and afterwards became bankrupt and absconded. The defendants sold the scrip at the market price of the day. The plaintiff unsuccessfully sued to recover the amount realized thereby.

In *Rumball v. Metropolitan Bank* (*i*) scrip certificates, by which it was certified that, after the payment of certain instalments, the bearer thereof would be entitled to be registered as the holder of shares in a banking company, were issued to the plaintiff, and by him deposited with a stockbroker, for the purpose of paying the instalments remaining due, and dealing with such certificates as the plaintiff should direct. The broker, in fraud of the plaintiff, and without his authority, deposited the scrip with the defendants, as security for an amount due from him, the broker, to the defendants. The defendants were not aware of the fraud. It was proved that the usage among bankers, discounters, money-dealers, and on the Stock Exchange, had been for many years to treat such scrip certificates as negotiable instruments transferable by mere delivery. It was held, following *Goodwin v. Roberts*, that the defendants were entitled to the scrip certificates as against the plaintiff—first, on the ground that, by reason of the usage, the certificates had become negotiable instruments transferable by mere delivery; and, secondly, on the ground that the plaintiff, by depositing with his broker instruments purporting to be transferable by delivery to a *bonâ fide* holder for value, was estopped from denying that they were so transferable.

V. Exchequer Bills.

In *Wookey v. Pole* (*k*) an exchequer bill, the blank in which was not filled up, having been placed for sale in the hands of A., he, instead of selling it, deposited it at his bankers', who made him

(*h*) (1875), L. R. 10 Ex. 337; (1876), Q. B. 346.

1 A. C. 476.

(*k*) (1820), 4 B. & Ald. 1. Cf. *Brandao*

(*i*) (1877), 2 Q. B. D. 194; 46 L. J. v. *Barnett* (1846), 12 Cl. & F. 787.

advances to the amount of its value. A. afterwards becoming bankrupt, it was held that the owner of the exchequer bill could not maintain trover against the bankers, the property in such an exchequer bill passing by delivery.

VI. East India Bonds.

Bonds of the old East India Company were apparently negotiable by statute (*l*).

Instruments not Negotiable.

With a few doubtful exceptions, it may be taken that all other documents are at present not negotiable, whether they are transferable by mere delivery or not.

A document not transferable by delivery (with or without indorsement) cannot be negotiable. But a document which is so transferable is not, by virtue of that fact alone, negotiable.

Share Warrants.—"It is difficult to see how shares, share warrants, or certificates of shares in a company, which are not securities for money, can be entitled to" the description of negotiable securities (*m*).

Certificates of American Shares.—Certificates of shares in certain American railways (Pennsylvania (*n*), and New York Central (*o*)) have been decided to be not negotiable in this country (*p*).

Banker's Receipt for Bonds.—A banker's receipt for bonds deposited for registration is not a negotiable instrument passing the property in the bonds by delivery (*q*).

Post Office Orders.—These instruments are apparently not negotiable (*r*).

(*l*) 51 Geo. 3, c. 64, s. 4; *Glyn v. Baker* (1811), 13 East, 509.

(*m*) Per Bowen, L. J., in *Little v. Joint Stock Banking Co.*, [1891] 1 Ch. 270, at p. 296. Cf. Companies Act, 1867 (30 & 31 Vict. c. 131), ss. 27—36.

(*n*) *London and County Banking Co. v. London and River Plate Bank* (1887), 20 Q. B. D. 232; (1888), 21 Q. B. D. 535.

(*o*) *Colonial Bank v. Cadz* (1890), 15 A. C. 267.

(*p*) See also Sect. 5 of this chapter.

(*q*) *Beauleclerk v. Greaves* (1886), 2 T. L. R. 837.

(*r*) *Fine Art Society v. Union Bank of London* (1886), 17 Q. B. D. 705. Cf. *McEntire v. Potter & Co.* (1889), 22 Q. B. D. 438, at p. 442.—Postal orders may

A negotiable instrument may be made a security for money lent by way of a mortgage or a pledge. From the nature of the case—seeing that they pass by mere negotiation—the latter is the ordinary method, and the only one which need be specially considered.

Pledges.

The principal consideration in this connection is that of the title obtained by the banker.

Title of Banker.—The general rule is that a person taking a negotiable instrument in good faith and for value obtains a valid title thereto, although he may take from one who himself had none. In the case of a bill of exchange, promissory note, or cheque, this rule must be stated in the following modified form: A holder in due course has a good title to the instrument. Substantially there is little difference in the two statements: it is rather that the general rule has been specifically adapted by statute to the particular case of bills, notes and cheques.

It will, however, be safer to treat the two classes separately.

I. Negotiable Instruments Generally.

First, then, as to negotiable instruments other than bills, notes and cheques.

The questions which arise here are—(1) Did the banker take the instrument in good faith? and (2) Did he take it for value?

Good Faith.—This is pre-eminently a question of fact.

Negligence does not exclude good faith.

“It is not enough,” said Lord Blackburn, in *Jones v. Gordon* (s), “to show that there was carelessness, negligence, or foolishness in not suspecting that the bill was wrong, when there were circumstances which might have led a man to suspect that. All these are matters which tend to show that there was dishonesty in not doing it, but they do not in themselves make a defence to an action upon a bill of exchange. I take it that in order to make such a defence,

now be issued to a maximum amount of Act, 1903 (3 Edw. 7, c. 12), s. 1.
a guinea: Post Office (Money Orders) (s) (1877), 2 A. C. 616, at p. 628.

whether in the case of a party who is solvent and *sui juris*, or when it is sought to be proved against the estate of a bankrupt, it is necessary to show that the person who gave value for the bill, whether the value given be great or small, was affected with notice that there was something wrong about it when he took it. I do not think it is necessary that he should have notice of what the particular wrong was. If a man, knowing that a bill was in the hands of a person who had no right to it, should happen to think that perhaps the man had stolen it, when if he had known the real truth he would have found, not that the man had stolen it, but that he had obtained it by false pretences, I think that would not make any difference if he knew that there was something wrong about it and took it. If he takes it in that way he takes it at his peril. But then I think that such evidence of carelessness or blindness as I have referred to may with other evidence be good evidence upon the question which, I take it, is the real one, whether he did know that there was something wrong in it. If he was (if I may use the phrase) honestly blundering and careless, and so took a bill of exchange or a bank-note when he ought not to have taken it, still he would be entitled to recover. But if the facts and circumstances are such that the jury, or whoever has to try the question, came to the conclusion that he was not honestly blundering and careless, but that he must have had a suspicion that there was something wrong, and that he refrained from asking questions, not because he was an honest blunderer or a stupid man, but because he thought in his own secret mind—I suspect there is something wrong, and if I ask questions and make farther inquiry it will no longer be my suspecting it, but my knowing it, and then I shall not be able to recover—I think that is dishonesty. I think, my Lords, that that is established, not only by good sense and reason, but by the authority of the cases themselves” (t).

“It may be taken as . . . established,” said Lord Brougham, delivering the judgment of the Judicial Committee in *Bank of Bengal v. Fagan* (u), “that whatever may have been the law laid

(t) This case was followed in *In re Boyse, Crofton v. Crofton* (1886), 55 L. T. 391 (see pp. 396-7 of this report); 33 Ch. D. 612.

(u) (1849), 7 Moo. P. C. 61, at p. 72.

down in *Gill v. Cubitt* (x) and *Down v. Halling* (y), and one or two other cases, and not abandoned at least as far as the language went, which the Court used in some subsequent cases, is now law no longer; and that the negligence of the party taking a negotiable instrument does not fix him with the defective title of the party passing it to him" (z).

So, again, in *Venables v. Baring Brothers & Co.* (a), it was held that mere negligence on the part of the transferee of a negotiable instrument to avail himself of means at his disposal to detect the bad title of the transferor cannot be pleaded as a defence to an action on the instrument by the transferee (b).

It may be gathered from the foregoing that there are certain recognized tests which judges themselves apply, and which they direct juries to apply, in order to ascertain the existence of good or bad faith. But the latter are in their nature ultimate conceptions, to arrive at which no particular mental route is necessary. The positive law upon the subject begins and ends with the statement that a taking in good faith is essential to a perfect title. Whether the taking was in good faith is a pure question of fact, for the ascertainment of which the law makes no special provision of a positive character (c).

This subject was temporarily obscured by the way in which the decision of the House of Lords in *Earl of Sheffield v. London Joint Stock Bank* (d) was generally understood. In that case it was inferred, from the fact that the bank knew that the pledgor of negotiable instruments was a money-dealer, coupled with the other circumstances, that they had notice of a defect in his title.

This decision, being fully reported, was widely regarded as laying down new law, and as suggesting, at all events, that the equitable doctrine of constructive notice might have some application to negotiable instruments. This being so, it was fortunate that the case was soon afterwards discussed in a subsequent appeal, where the learned Lords pointed out its true character as a decision

(x) (1824), 3 B. & C. 466.

(y) (1825), 4 B. & C. 330.

(z) Cf. *In re Gomersall*, cited at p. 593, *supra*.

(a) See p. 772, *supra*.

(b) See also *Raphael v. Bank of England*, cited at p. 503, *supra*.

(c) See per Lord Mansfield in *Peacock v. Rhodes* (1781), 2 Doug. 633.

(d) (1838), 13 A. C. 333.

upon the facts of the case only. It is important to view it in this light; as, in similar circumstances, a jury, or other judges, would be at liberty to draw an opposite conclusion. Only in identical circumstances, which it is highly improbable will recur, if at all, will the decision be conclusive of any other case.

The two cases referred to must now be considered.

In *Earl of Sheffield v. London Joint Stock Bank* (e) S. gave to E. certificates of railway stock, with transfers executed by him in blank, and bonds of foreign companies, for the purpose of raising 26,000*l.* E. gave these securities to M., a money-dealer in London, to secure 26,000*l.* advanced by M. to E. M. deposited the transfers and securities, together with other securities of his customers, with various banks, as security for large loan accounts running between him and them, the blanks in the transfers of stock being filled up with the names of nominees of the banks. The banks in so dealing either actually knew, or had reason to believe, that the securities did or might belong, not to M., but to his customers. M. having become bankrupt, the banks sold some of S.'s securities, and claimed to hold the proceeds and the unsold remainder as security for all the debt due from M. to them. It was held that, though the banks had the legal title to the securities, they were not purchasers for value without notice, but ought to have inquired into the extent of M.'s authority, and this whether the securities were negotiable or not; and that, upon payment to the banks of the money advanced by M. to E., S. was entitled to the value of such of the securities as had been sold by the banks, and to redeem the remainder.

The decision in this case was explained by Lord Herschell in *London Joint Stock Bank v. Simmons* (f) as follows (g): "The question which arose was whether the bank could insist on retaining them for the larger sum, or whether the owner could redeem them on paying to the bank the amount for which they were originally pledged. The noble and learned Lords came to the conclusion, as I understand, that the bank knew that Mozley held the securities in question as pledgee only in respect of an advance made upon them, or that, if they did not actually know this, what

(e) See last note.

(f) [1892] A. C. 201.

(g) At p. 219.

they knew of the nature of his business as a money-lender, and the information which they derived from their transactions with him, made it almost certain that this was the case. That knowing, or having every reason to believe, that his title was only that of pledgee for a limited advance, they knew, or had reason to believe, that in pledging them to the bank for his entire indebtedness he was exceeding any authority he had to deal with them. That under these circumstances it was incumbent upon them to make some further investigation if they wished to insist upon their security to the full extent. That the circumstances, as it was said, put them upon inquiry. I gather that their Lordships must further have been of opinion that if the bank had made reasonable inquiries they would have ascertained the facts, and have thus had distinct knowledge of circumstances which would have made it appear that they could not hold the securities for anything beyond the advance in respect of which Mozley held them, and that in offering them as a security for a greater sum Mozley was exceeding any authority he had to deal with them. My reason for inferring that their Lordships entertained this opinion is, that I apprehend that when it is said that a person is put on inquiry the result in point of law is that he is deemed to know the facts which he would have ascertained if he had made inquiry. He cannot better his position by abstaining from so doing. On the other hand, his position cannot be worse than it would have been had he made inquiry and been in possession of the result of it. Supposing Mozley had been questioned as to his right to deal with the securities, and had given a satisfactory assurance, and there had been no reason to doubt his honesty, I cannot but think that the decision of this House would have been different. There was in the case then before the House, however, no ground for supposing that if Mozley had been asked the question the facts would not have been elicited. When once the conclusion was reached that the bank must be taken to have known that Mozley was exceeding any rights which he possessed in relation to the securities in purporting to pledge them for the sum he did, it followed that it would be contrary to good faith for the bank to retain them for anything beyond the sum for which he could legitimately pledge them; that as regards the excess the bank, though holders for

value, were not holders of the securities in good faith. It will thus be seen that the judgment, which certainly did not purport to be a new departure or to lay down any principle of law differing from that already established, turned entirely upon the view taken of the facts. It would be unbecoming, as it is unnecessary, for me to express any opinion whether the findings were warranted by the facts proved. It is enough for me to say that the judgment leaves untouched what I believe to have been down to that time the established rule of law, that a person taking a negotiable instrument in good faith and for value obtains a title valid against all the world. *Sheffield v. London Joint Stock Bank* may perhaps be a binding authority as to the conclusions of fact arrived at, where the facts are identical, but not otherwise. In any other case the tribunal must investigate the facts for itself, and determine whether those who claim to hold a negotiable instrument have made out that they took it in good faith and for value."

In *The London Joint Stock Bank v. Simmons* (h) the facts were as follows: In October, 1887, Herapath, Delmar & Co., a firm of stockbrokers, had in their possession, for safe custody merely, the bonds of \$15,000 Cedulas belonging to Simmons. On the 12th October, Delmar, on behalf of his firm, entered into a contract with Prior and Williams, jobbers on the Stock Exchange, to sell them \$15,000 of Cedulas for the settling day of the 14th October. At the same time he contracted with Prior and Williams to purchase of them like bonds of the same amount for the account of the 28th October, the price of these latter bonds being the same for which the former were sold, with interest at the rate of 6 per cent. for fourteen days added. On the 14th October, in pursuance of the contract of sale, Delmar's firm delivered to Prior and Williams, or their nominees, the bonds of Simmons. On the 28th October, in pursuance of the simultaneous contract of purchase, Herapath, Delmar & Co. received from Greenwell & Co., a firm of brokers whose name appeared on the clearing-ticket given by Prior and Williams, Cedula bonds of the same description and to the same amount as those which had belonged to Simmons. The bank had for many years been in the habit of making

advances to Herapath, Delmar & Co., receiving, as security for such advances, stocks, shares, and bonds. The securities deposited were frequently changed, such changes generally taking place at or about the time of the fortnightly settlements on the London Stock Exchange. On the 28th October, that firm obtained from the bank a temporary advance of 6,500*l.*, in addition to the then current loan; and, in addition to the securities which the bank then held for the moneys already advanced, and which, by the terms of their security, they were entitled to hold for any further advances, the firm deposited with the bank the Cedula bonds which they had obtained from Greenwell & Co. on that day. The bonds were obtained from Greenwell & Co. in exchange for a cheque on the bank, and without the advance of the 6,500*l.* the firm would not have had at the bank sufficient funds to meet that cheque and the other cheques drawn by the firm on that day. Delmar afterwards absconded, and his firm suspended payment. The bonds having been sold by the bank, Simmons, on discovering what had been done, sued the bank, alleging that Delmar had pledged the bonds without his authority.

It was held by the House of Lords that there having been, as a matter of fact, no circumstances to create suspicion, the bank was entitled to retain and realize the securities, they being negotiable instruments, and the bank having taken them for value and in good faith.

The grounds of this decision appear sufficiently from the following passages in the judgment of Lord Herschell: "I shall assume," said his Lordship, "for the purpose of my opinion, that these bonds were the property of the plaintiff. The first question which arises, and to my mind a cardinal one, is, are these bonds negotiable instruments? . . . Having regard to the evidence . . . given, to the nature of the bonds, and to the decision of this House in the case of *Goodwin v. Roberts* (i), I can entertain no doubt that these Cedula bonds are negotiable instruments within the purview of that decision. . . . It is surely of the very essence of a negotiable instrument that you may treat the person in possession of it as having authority to deal with it, be he agent or otherwise, unless

(i) See p. 775, *supra*.

you know to the contrary, and are not compelled, in order to secure a good title to yourself, to inquire into the nature of his title, or the extent of his authority. . . . I should be very sorry to see the doctrine of constructive notice introduced into the law of negotiable instruments. But regard to the facts of which the taker of such instruments had notice is most material in considering whether he took in good faith. If there be anything which excites the suspicion that there is something wrong in the transaction, the taker of the instrument is not acting in good faith if he shuts his eyes to the facts presented to him and puts the suspicions aside without further inquiry. . . . The bank did not know, and had no reason to know, in what capacity Delmar became possessed of the bonds. They might be his own; he might be purchasing them for himself or a principal, and be seeking by an advance from the bank to obtain the means of paying the price, or they might be bonds on which he had himself made an advance. I cannot see that there was anything to suggest to the bank that he was committing a wrong or to make it reasonable and right that they should make further inquiry before entering upon the transaction. . . . I desire to rest my judgment upon the broad and simple ground that I find, as a matter of fact, that the bank took the bonds in good faith and for value. It is easy enough to make an elaborate presentation after the event of the speculations with which the bank managers might have occupied themselves in reference to the capacity in which the broker who offered the bonds as security for an advance held them. I think, however, they were not bound to occupy their minds with any such speculations. I apprehend that when a person whose honesty there is no reason to doubt offers negotiable securities to a banker or any other person, the only consideration likely to engage his attention is, whether the security is sufficient to justify the advance required. And I do not think the law lays upon him the obligation of making any inquiry into the title of the person whom he finds in possession of them; of course, if there is anything to arouse suspicion, to lead to a doubt whether the person purporting to transfer them is justified in entering into the contemplated transaction, the case would be different: the existence of such suspicion or doubt would be inconsistent with good faith. And if no inquiry were made, or if on inquiry the doubt were not

removed and the suspicion dissipated, I should have no hesitation in holding that good faith was wanting in a person thus acting" (*k*).

Value.—The law as to this is the same in the case of all negotiable securities.

The Bills of Exchange Act declares—

27.—(1.) Valuable consideration for a bill may be constituted by: (a) Any consideration sufficient to support a simple contract; (b) An antecedent debt or liability. Such a debt or liability is deemed valuable consideration whether the bill is payable on demand or at a future time.

(2.) Where value has at any time been given for a bill the holder is deemed to be a holder for value as regards the acceptor and all parties to the bill who became parties prior to such time.

(3.) Where the holder of a bill has a lien on it, arising either from contract or by implication of law, he is deemed to be a holder for value to the extent of the sum for which he has a lien.

The requirement as to value is satisfied if any real consideration, however inadequate, has been given (*l*).

But, as a test of the existence of good faith, the amount of the consideration given is pre-eminently important (*m*).

The position of the banker as a holder for value has been treated in divers parts of this work (*n*).

In *London and County Banking Co. v. London and River Plate Bank* (*o*) certain negotiable securities were stolen from the defendants by their manager, and came into the possession of the plaintiffs for value, and without notice of any fraud. Subsequently the manager obtained the securities from the plaintiffs by fraud, and restored them to the defendants, who did not know

(*k*) See also *Scott v. Union Discount Co. of London* (1891), *Journal of the Institute of Bankers*, Vol. XII. p. 136; *Baker v. Nottingham and Nottinghamshire Banking Co.* (1891), *ibid.* p. 139; 60 L. J. Q. B. 542; *Haynes v. Foster* (1833), 2 C. & M. 237; and *Foster v. Pearson* (1835), 1 C. M. & R. 849 (where the position of bill-brokers was much discussed). The latter

case was referred to by several of the learned Lords in their speeches in *London Joint Stock Bank v. Simmons*.

(*l*) See *Jones v. Gordon* (1877), 2 A. C. 616.

(*m*) *Ibid.* See Willis on Negotiable Securities, 2nd ed. pp. 22—23.

(*n*) See, *e.g.*, pp. 470, 539.

(*o*) (1888), 21 Q. B. D. 535.

that the securities had been out of their possession. A portion of the restored securities were not the bonds actually stolen, but bonds of a like kind and value. It was held that, in the absence of evidence to the contrary, it should be presumed that the defendants accepted the securities in discharge of their manager's obligation to restore them, and were therefore *bonâ fide* holders for value, and entitled to retain them.

In *Symons v. Mulkern* (*p*) a bank advanced moneys to a customer upon promissory notes, on the back of each of which he placed an indorsement, by which he charged all his property, shares, or securities, which then were or which might be, at any time prior to the payment of the note, "in the possession or power of the holder thereof for the time being," with the payment of the promissory note and interest. After several such transactions had taken place, the customer obtained an advance upon a French bond, payable to bearer and transferable by delivery, and he subsequently handed the bank another French bond, and requested that both might be sold on his account. On the latter occasion he obtained no advance of money. On the bonds being sent to the bank's brokers for sale it was discovered that both had been stolen. It was held that, as to the first bond, the bank, having taken it *bonâ fide* and for valuable consideration, were entitled to retain it as a security for whatever was due to them from the customer; but that, as to the second bond, they must deliver it up to the plaintiffs, the true owners thereof, since no advance had been made upon it, and the charge indorsed upon the promissory note did not apply to the case, because it could only apply to property of the maker of the note placed in the possession or power of the holder for a purpose not inconsistent with an assertion of such a charge, and the bond in question was handed to the bank for a limited object inconsistent with the setting up of a lien by the bank.

"The holder—viz., the bank—received this bond," said Fry, J., "for a specific and limited purpose, viz., for the purpose of selling through the intervention of their broker. They received with that possession or power a special mandate, viz., to sell the bond. For that mandate they gave no consideration. The mandate, therefore,

was gone. It might, as it appears to me, have been recalled by Selwyn at any moment before the execution of it, and, as it never was executed, it might have been recalled by Selwyn at any time down to the present time. Again, the possession of or power over the bond which was given to Mr. Edward Ravenscroft" (the secretary of the bank) "was inconsistent with the bank setting up a lien or charge upon the bond itself, because his obligation was to sell the bond; and if they had any right by virtue of their charge, they might have intercepted that sale and have said that the bond should not be sold" (q).

II. Bills of Exchange, Promissory Notes and Cheques.

If the banker takes a bill, note or cheque in such a way as to become a holder in due course, he acquires a good title.

Holder in Due Course.—The Bills of Exchange Act provides—

29.—(1.) A holder in due course is a holder who has taken a bill, complete and regular on the face of it^(r), under the following conditions; namely:

- (a) That he became the holder of it before it was overdue^(s), and without notice that it had been previously dishonoured, if such was the fact;
- (b) That he took the bill in good faith^(t) and for value^(u), and that at the time the bill was negotiated to him he had no notice of any defect in the title of the person who negotiated it^(x).

(2.) In particular the title of a person who negotiates a bill is defective within the meaning of this Act when he obtained the bill, or the acceptance thereof, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud.

(3.) A holder (whether for value or not) who derives his title to a bill through a holder in due course, and who is not himself

(q) See also *Bosanquet v. Dudman* (1814), 1 Stark. 1.

(r) A bill accepted in blank or wanting in any material particular, or which has been torn and pasted together again in such a way that an intention to cancel it is indicated, will not be "complete and regular on the face of it": *Aude v.*

Dixon (1851), 6 Exch. 869; *Ingham v. Primrose*, cited at p. 259, *supra*.

(s) See sects. 36 (3), cited on p. 788, *infra*; 86 (3), 73; and pp. 266, 444, *supra*.

(t) See sect. 90, at p. 286, *supra*, and pp. 777—785, *supra*.

(u) See pp. 785—786, *supra*.

(x) See pp. 777—785, *supra*.

a party to any fraud or illegality affecting it, has all the rights of that holder in due course as regards the acceptor and all parties to the bill prior to that holder.

The conditions expressed in this section are obviously, to a large extent, involved in the conditions of good faith and value which are applicable to negotiable instruments generally, and which have been considered already (*y*).

30.—(1.) Every party whose signature appears on a bill is *primâ facie* deemed to have become a party thereto for value.

(2.) Every holder of a bill is *primâ facie* deemed to be a holder in due course; but if in an action on a bill it is admitted or proved (*z*) that the acceptance, issue, or subsequent negotiation of the bill is affected with fraud, duress, or force and fear, or illegality, the burden of proof is shifted, unless and until the holder proves that, subsequent to the alleged fraud or illegality, value has in good faith been given for the bill.

Banker Holding Otherwise than in Due Course.—A person who holds a bill, note, or cheque, but who is not a holder in due course, is in a position similar to that of the assignee of an ordinary chose in action (*a*). He takes the instrument subject to equities attaching to it.

36.—(2.) Where an overdue bill is negotiated, it can only be negotiated subject to any defect of title affecting it at its maturity, and thenceforward no person who takes it can acquire or give a better title than that which the person from whom he took it had.

(3.) A bill payable on demand is deemed to be overdue within the meaning and for the purposes of this section, when it appears on the face of it to have been in circulation for an unreasonable length of time. What is an unreasonable length of time for this purpose is a question of fact.

(4.) Except where an indorsement bears date after the maturity of the bill, every negotiation is *primâ facie* deemed to have been effected before the bill was overdue.

(5.) Where a bill which is not overdue has been dishonoured, any person who takes it with notice of the dishonour takes it subject to any defect of title attaching thereto at the time of dishonour, but nothing in this sub-section shall affect the rights of a holder in due course.

(*y*) See pp. 777—787, *supra*.

(*z*) See *Tatam v. Haslar* (1889), 23

Q. B. D. 345.

(*a*) See Sect. 7 of this chapter.

In *In re European Bank, Ex parte Oriental Commercial Bank* (b), P., the manager of the O. bank, abstracted moneys of the bank, and bought with them, on the 21st of March, 1867, certain overdue bills of exchange. On the 4th of April, 1867, the E. company, promoted by P., was registered, of which, till July in that year, P. was the sole director. On the 6th of April, 1867, P. sold these bills to the E. company, and paid himself for them out of their funds. The E. company were still the holders. The bills were proved in the winding-up of the company on which they were drawn. It was held that the E. company were not affected with notice of the title of the O. bank through the knowledge of P., as P. could not be taken to have disclosed to the E. company his own fraud; but that the claim of the O. bank to the bills, as having been purchased with their money, was an equity attaching to the bills; that the E. company, having purchased them when overdue, took subject to this equity; and that the O. bank were entitled to the benefit of the proof.

In order, however, that it may affect the holder, the equity must be one attaching to the bill itself. The right of set-off is not such an equity (c).

Rights of Banker.

38. The rights and powers of the holder of a bill are as follows:

(1.) He may sue on the bill in his own name.

(2.) Where he is a holder in due course, he holds the bill free from any defect of title of prior parties, as well as from mere personal defences available to prior parties among themselves, and may enforce payment against all parties liable on the bill.

(3.) Where his title is defective (a) if he negotiates the bill to a holder in due course, that holder obtains a good and complete title to the bill, and (b) if he obtains payment of the bill the person who pays him in due course gets a valid discharge for the bill.

As pledgee, the banker may detain the negotiable instrument until the sum which he has advanced upon it is repaid. He may receive payment of the instrument from the party liable thereon, and, if necessary, he can sue upon it.

(b) (1870), 5 Ch. 358.

(c) *In re Overend, Gurney & Co., Ex parte Swan* (1868), 6 Eq. 344.

"If the pledgor could have sued on the bill, the pledgee can recover the whole. If the title of the pledgor is defective, the pledgee can recover the amount of his advance, provided he took the bill without notice" (*d*).

Where the banker recovers more than the amount due to him upon his loan he must hand over the surplus to the pledgor.

In *Reid v. Furnival* (*e*) a bill of exchange for 300*l.* being sent to A. to get it discounted, a banking company advanced 100*l.* on the bill upon A. giving the company his guarantee for the amount so advanced. A. had no other interest in the bill. It was held, in an action brought by A. on the bill, that he was entitled to recover the whole amount, and not merely the amount for which he gave his guarantee.

A rule for a new trial was refused, Baron Bayley saying: "Somebody else may have a demand for 200*l.*; but there cannot be two actions on one note. As soon as the plaintiff recovers the whole amount, he becomes a trustee for the person entitled to the remainder of the money, after deducting the amount that he has advanced" (*f*).

Where a bill of exchange, accepted for the accommodation of the drawer, is deposited by him as a security for a debt less than the amount of the bill, the holder is entitled to prove in the bankruptcy of the acceptor for the full amount of the bill, though he cannot receive dividends in excess of the debt due to him by the drawer (*g*).

A banker can obtain a charge upon goods or securities against which a bill is drawn, only by a distinct agreement; except in cases where the rule in *Ex parte Waring* applies (*gg*).

Duty of Banker.

A pledgee, as we have seen (*h*), is bound to exercise due care and diligence with regard to the thing pledged with him.

(*d*) Chalmers' Bills of Exchange, 6th ed. p. 87. See sect. 27 (3) of the Act, cited at p. 785, *supra*.

(*e*) (1833), 1 Cr. & M. 538.

(*f*) Cf. *Scott v. Franklin* (1812), 15 East, 428.

(*g*) *Ex parte Newton, Ex parte Griffin, In re Bunyard* (1880), 16 Ch. D. 330.

(*gg*) Chalmers' Bills of Exchange, 6th ed. pp. 302—303; *Inman v. Clare* (1858), Johns. 769, at p. 776; *Robey v. Ollier* (1872), 7 Ch. 695, at pp. 698—699; *Brown, Shipley & Co. v. Kough* (1885), 29 Ch. D. 848. See also pp. 554—556, *supra*; and, as to the rule in *Ex parte Waring*, pp. 389—398, *supra*.

(*h*) At p. 752, *supra*.

In *Peacock v. Purssell* (i) it was held that if a creditor takes a bill of exchange from his debtor as collateral security for the payment of his debt, and retains it until it becomes due, his duty is to present the bill for payment, and, if the bill be dishonoured, to give notice of dishonour in the same way as if he were absolute owner of the bill. If he omits to do this, and the bill consequently becomes worthless, he cannot afterwards sue his debtor, either on the bill or on the original consideration.

"It seems," said Byles, J., "that the plaintiffs were at liberty to sue for the debt, in respect of which the bill was given as a security, at any time before the maturity of the bill. But they had all the rights of the holder of a bill of exchange, and were entitled to claim payment of the bill from the parties liable on it; and having all the rights, they are also liable to the duties of holder, one of which is to give due notice of dishonour" (k).



SECTION V.

STOCKS AND SHARES.

Stocks and shares are not negotiable, or legally transferable by mere delivery, and, accordingly, in order that a satisfactory security may be obtained in respect of them, a mortgage is desirable. Thus, whereas pledging is the accustomed means of giving a security over negotiable instruments, mortgaging is the appropriate and usual method in the case of stocks and shares. Indeed, where the certificates of shares or stock are merely deposited, there will, in effect, except in the case of share or debenture warrants to bearer, be an equitable mortgage and not a pledge (l).

The Legal Title.

The banker will obtain a valid security where he gets the legal title in the stock or shares in question without notice of any equitable interest therein on the part of a third person (m).

(i) (1863), 32 L. J. C. P. 266.

(k) Cf. *Yglesias v. Mercantile Bank of the River Plate* (1878), 3 C. P. D. 330.

(l) *Harrold v. Plenty*, [1901] 2 Ch. 314. See also *Ex parte Moss* (1849), 3

De G. & S. 599; *Ex parte Stewart, In re Shelley* (1864), 4 De G. J. & S. 543.

(m) See per Lord Blackburn in *Colonial Bank v. Whinney* (1886), 11 A. C. 426,

The legal title is obtained where a transfer duly executed in favour of the banker is registered, or where the banker has, as between himself and the company, a present and unconditional right to have a transfer registered (*n*).

“One partner in a banking firm would have a right to accept a transfer of shares by way of security for a loan of money, as such a transaction would be a part of ordinary banking business” (*o*).

“If bankers lend money to a shareholder, and agree with him to take a certain number of shares in a limited company as security for that loan, and those shares are transferred to them, they become shareholders in the company. . . . If money has been lent by a banking firm to a shareholder in a company, one partner in that firm has authority to take a transfer of shares in the company as security for that loan; and . . . if a transfer is under those circumstances made and registered, the members of that firm do, to all intents and purposes, become shareholders in the company” (*p*).

Similarly, in the case of a banking company, there is no obstacle to its becoming the legal holder of shares in another company (*q*).

The Transfer.

A deed is necessary for a transfer in the case of a company incorporated under the Companies Act when prescribed by its regulations, but not otherwise (*r*). In the case of a company incorporated to carry on an undertaking of a public nature, a transfer is required by the Companies Clauses Consolidation Act, 1845 (*s*), to be by deed (*t*). In the case of other companies, incorporated by special Act or by Charter, a transfer must be in the form prescribed by such Act or Charter, or by the regulations governing the company.

A company registered under the Companies Acts may issue, in

at p. 433; *In re Tahiti Cotton Co.*, *Ex parte Sargent* (1873), 17 Eq. 273; *France v. Clark* (1884), 26 Ch. D. 257, at p. 262.

(*n*) See the cases cited on pp. 796—801, *infra*.

(*o*) Per James, L. J., in *Weikersheim's Case* (1873), 8 Ch. 831, at p. 835.

(*p*) Per Mellish, L. J., in the case last mentioned, at p. 838. See this case commented on in *Niemann v. Niemann*

(1889), 43 Ch. D. 198.

(*q*) *In re Barne'd's Banking Co.*, *Ex parte The Contract Corporation* (1867), 3 Ch. 105, and the case cited in the following note.

(*r*) Companies Act, 1862 (25 & 26 Vict. c. 89), s. 22; *In re Tahiti Cotton Co.*, *Ex parte Sargent* (1873), 17 Eq. 273.

(*s*) 8 & 9 Vict. c. 16.

(*t*) *Ibid.* s. 14.

the case of fully paid-up shares and stock, share warrants to bearer transferable by delivery, and entitling the bearer to the shares or stock specified therein (*u*).

Blank Transfers.—There is an important distinction to be observed as to blank transfers. Where the transfer is required to be by deed, the legal estate will not pass, although a blank transfer has been delivered, together with the certificates, and subsequently filled up by the banker in his own favour (*x*). Where a deed is unnecessary it is otherwise (*y*). The reason for this distinction lies in the technical rule that a deed takes effect from its delivery, and cannot subsequently take effect as a deed, in an altered form, without re-delivery (*x*).

In *Swan v. North British Australasian Company* (*z*) the plaintiff, the registered owner of 1,000 shares in a joint stock company, in which the shares could only be transferred by deed executed by both transferor and transferee, employed a broker to sell for him some shares in another company, which were also transferable by deed only. The broker represented to the plaintiff that it was necessary for him to execute ten blank forms of transfer. The plaintiff accordingly signed, sealed, and delivered to the broker ten forms of transfer in blank to be filled up by him for the transfer of the shares in the other company. The broker only used eight of the blank forms for that purpose, and, having stolen the certificates from a box deposited at a bank for safe custody, he feloniously filled up the two remaining forms as transfers respectively of 500 of the plaintiff's 1,000 shares in the first-mentioned company, and, having forged the attestations, he delivered the transfers, together with the certificates, to *bonâ fide* purchasers for value, and on their being presented to the company, they removed the plaintiff's name

(*u*) Companies Act, 1867 (30 & 31 Vict. c. 131), ss. 27, 28. As to the nature of these instruments, see p. 776, *supra*.

(*x*) See cases cited *infra*, on pp. 793—796.

(*y*) In *re Tahiti Cotton Co.*, *Ex parte Sargent*, note (*r*) on p. 792, *supra*. See also *In re Tees Bottle Co.* (1876), 33 L. T. 834, affirmed on appeal: see per Hall, V.-C.,

at 47 L. J. Ch. 171; *Ortigosa v. Brown* (1878), 47 L. J. Ch. 168; *France v. Clark* (1884), 26 Ch. D. 257; *Fox v. Martin* (1895), 64 L. J. Ch. 473; W. N. (1895) 36.

(*z*) (1863), 2 H. & C. 175. The head-note in this case was criticised by Bigham, J., in *Union Credit Bank v. Mersey Docks and Harbour Board*, [1899] 2 Q. B. 205, at p. 210.

from the register of shareholders, and placed thereon the names of the purchasers. It was held that the transfers were void, and that there was no such negligence on the part of the plaintiff as estopped him from insisting that the property in the shares did not pass under the transfers. Negligence, to operate as an estoppel, must be the proximate cause of the loss (a).

In *Société Générale de Paris v. Walker* (b) M., the holder of shares in a company, deposited with S. certificates of the shares and a blank transfer as security for a debt. Afterwards he fraudulently executed a blank transfer in respect of the shares, and deposited it with the appellants as security for a debt. On being applied to by the appellants for the share certificate he stated that it was lost or mislaid. The appellants stamped their transfer, filled up the blanks, had it executed by their manager as the transferee, and sent it to the company's office with a request that the company would "certify it," and with an indemnity against any claim in respect of the missing certificates. The company did not accept the indemnity, and declined to certify. Shortly after, S. having died, his executors gave notice to the company of their charge upon the shares. The company was incorporated under the Companies Act, 1862. The articles of association provided that the shares should be transferable only by deed; that lost certificates might be renewed upon satisfactory proof of the loss, or in default of proof upon a satisfactory indemnity being given; and that the company should not be bound by, or recognize any, equitable interest in shares. Each certificate stated, under the company's seal, that no transfer of any portion of the shares represented by the certificate would be registered until the certificate had been delivered at the company's office. The appellants having brought an action against the executors for a declaration of their title to the shares and to restrain the executors from dealing with the shares, it was held that the transfer to the appellants not having been re-delivered by the transferor after the blanks were filled up was not his deed, and that the appellants had no legal title to the shares; that, as between themselves and the company, they never

(a) See also *Taylor v. Great Indian Peninsular Rail. Co.* (1859), 4 De G. & J. 559; *Rimmer v. Webster*, [1902] 2 Ch. 163.

(b) (1885), 11 A. C. 20.

had an absolute and unconditional right to be registered as the shareholders; that nothing that had happened gave them a right on equitable grounds to displace the original priority of the equitable claim of the executors; and that the action could not be maintained.

Under the provisions of the Companies Clauses Consolidation Act, 1845, a deed of transfer of shares or stock does not pass the legal interest to the transferee until it has been delivered to the secretary of the company. If he returns it because it does not comply with the requisitions of the Act, it is to be considered as not delivered to him. Trustees who held railway stock in trust for H. B. absolutely, executed a deed of transfer to him, and delivered it to the secretary of the company, who returned it because it was not properly stamped and dated. After this H. B. made a voluntary settlement purporting to include this stock. Several years afterwards the defects in the deed of transfer were supplied, and it was delivered to the secretary, who received it and registered the stock in H. B.'s name. It was held that, at the time of the execution of the voluntary settlement, the stock was not legally vested in H. B., but that he was only equitable owner; that the voluntary settlement of it was therefore effectual, and that H. B.'s representative was bound to transfer the stock to the trustees of the voluntary settlement (c).

In *Powell v. London and Provincial Bank* (d) the sole executor and residuary legatee of the surviving trustee of a marriage settlement was the registered holder of a sum of stock of a company regulated by the Companies Clauses Consolidation Act, 1845, which was part of the trust fund. He deposited with a bank as security for an advance the stock certificate, a loan note undertaking to execute a proper assignment when required, and a blank transfer executed by himself. This transfer was not stamped, and was expressed to be in consideration of 5s. The bank, who had no notice of the trust, subsequently inserted their own name in the blank transfer and executed it; but the deed was not re-delivered by the borrower, nor executed in his presence, nor by his authority under seal. The transfer was duly registered by the company, of which the bank informed the borrower. It was held that the

(c) *Nanney v. Morgan* (1889), 37 Ch. D. 346.

(d) [1893] 2 Ch. 555.

transfer was not the deed of the borrower and did not pass the legal title to the stock ; and that, therefore, although the bank were not affected with notice of the breach of trust, their title must be postponed to the prior equitable title of the persons interested under the trust.

Registration.

The legal title of the banker to the stock or shares mortgaged to him is only complete when he has been registered as the holder, or, as between himself and the company, has acquired a present and unconditional right to have a transfer to him registered.

In *Roots v. Williamson* (e) the deed of settlement under which a company was formed provided (a) that no person claiming to be the proprietor of any share by transfer should be treated as such unless and until he should have been registered in the register of shareholders as the proprietor of such share ; (b) that no person should be entitled to be registered as the proprietor of any share unless and until by execution of the deed of settlement, or some deed referring thereto, he should have undertaken all the obligations of a shareholder ; and (c) that every transfer should be effected by deed which, when executed, should be deposited or left at the office of the company. The plaintiff, a married woman living apart from her husband, purchased shares in the company with moneys forming part of her separate estate, and such shares were transferred to and registered in the name of W., who held them as trustee for her for her separate use. W., being indebted to the defendants, as a security for his debt, deposited with them the certificates, and executed to them a transfer of the shares. The deed of transfer did not refer to the deed of settlement, and the defendants sent it (along with the certificates) to the office of the company for registration, but did not execute, or offer to execute, the deed of settlement. The company, having received notice that the plaintiff claimed the beneficial ownership of the shares, did not proceed to register the transfer. In an action by the plaintiff to establish her title to the shares, it was held that the defendants had neither a complete legal title to the shares, nor, as

(e) (1888), 38 Ch. D. 485.

between themselves and the company, an unconditional right to be registered as shareholders in the place of W., and that their title being inchoate only was insufficient to defeat the pre-existing equitable title of the plaintiff.

In *Colonial Bank v. Hepworth* (*f*) it appeared that in August, 1883, T. & Co., as the brokers of the defendant, purchased for him on the market certain shares in the New York Central Railroad Company. The certificates were permitted by the defendant to remain with T. & Co. In November, 1883, T. & Co. deposited with the plaintiffs (with other securities) the certificates for the shares so purchased by them for the defendant as security for a large sum borrowed by them from the bank. On the 11th of December following the bank re-delivered to T. & Co. the certificates for the shares on the ground that they were desirous of sending them in for registration, and on the same day T. & Co. filled in the name and address of the defendant on the blank transfers and forms of surrender of the same certificates as the person in whose name the shares were to be registered. The new certificates were made out in the defendant's name, and were ready for issue on the 20th of December. The blank transfers on the back of these certificates were never signed by the defendant. On the 11th of December, when T. & Co. handed the certificates to the agents of the company for registration, they received from them a receipt which they then sent to the plaintiffs, which receipt the plaintiffs kept till the beginning of February, 1884, when, having learnt that a member of the firm of T. & Co. had absconded, they sent a clerk to the agents with the receipt, and obtained from them the new certificates for the shares, which up to the commencement of the action remained in their possession. The plaintiffs claimed a declaration that they were entitled to the shares. It was held that the case did not fall within the principle of estoppel, and that the defendant was the legal owner of the shares, and entitled to have the new certificates handed to him.

In the course of his judgment, Chitty, J., said: "No estoppel can be raised on a document inconsistent with the terms of the document itself. What, then, is the estoppel here? Having

(*f*) (1887), 36 Ch. D. 36.

regard to the practice proved and the condition in which these documents are when they pass from hand to hand, the right principle to adopt with reference to them is to hold that where (as is the case before me) the transfers are duly signed by the registered holders of the shares, each prior holder confers upon the *bonâ fide* holder for value of the certificates for the time being an authority to fill in the name of the transferee, and is estopped from denying such authority; and to this extent, and in this manner, but not further, is estopped from denying the title of such holder for the time being. By the delivery an inchoate legal title passes, but a title by unregistered transfer is not equivalent to what has been termed 'the legal estate' in the shares or to the complete dominion over them. Had the plaintiffs filled in their own names or the name of some nominee of their own in the blank transfers while in their possession, the case would have stood differently; the defendant would not have been registered as the holder of the shares. As it is, the plaintiffs never had a present absolute, unconditional right to register. Their inchoate title was liable to be defeated, and has been defeated by the defendant acquiring in good faith for value a complete legal title by transfer filled in with his name as transferee and by registration."

In *Moore v. North Western Bank* (g) a company's articles provided that no person should exercise the rights of a shareholder until he had been registered; that every transfer of a share not effected by operation of law should be effected in such form as the directors should approve; and that any transfer not approved of by the directors should be void. The directors had fourteen days within which to approve of, or decline, a proposed transferee. B. fraudulently deposited certificates of shares which were in his sole name as trustee for the plaintiffs with the defendants, together with a form of transfer in blank as to the numbers of the shares and the names of the transferees. The bank who took for value and without notice filled in the transfers with the names of some proposed transferees, and left them with the company for registration. On the next day the plaintiffs gave the company notice of their prior claim, and the company declined to register the transfer.

(g) [1891] 2 Ch. 599; 64 L. T. 456.

It was held that the title of the transferees was not complete when the transfer was presented, there being more than a mere ministerial act to be performed by the company before the transferees could claim to be registered as shareholders, and that the prior equity of the plaintiffs prevailed.

In *Ireland v. Hart* (*h*) on March 4th, 1901, I. executed to the defendant, H., as security for a loan a transfer in blank of certain shares in a company, which were registered in his name, but which he held as trustee for his wife, the plaintiff. H. had no notice of the plaintiff's title to the shares. On November 23rd, 1901, H., having filled up the blank transfer in his own name, left it, together with the certificate, at the company's offices for registration. On November 26th the managing director of the company had an interview with I. with reference to the transfer, the amount of the consideration, as filled in, not appearing to be the full value of the shares, and I. informed him that H. was not entitled to have the shares registered in his name, and requested the company to delay registration. On November 27th the directors held a meeting, at which the managing director stated what had occurred between I. and himself. The transfer was not formally before the meeting, no resolution was passed with reference to it, and it was not registered. On the same day the plaintiff brought an action against H. and I. and the company, claiming the shares, and obtained an interim injunction restraining the transfer. The company were not served with the writ until after the meeting of the 27th, and they had had no previous notice of the plaintiff's title. Art. 30 of the company's articles of association provided as follows: "The instrument of transfer of any share shall be signed both by the transferor and the transferee, and the transferor shall be deemed to remain the holder of such share until the name of the transferee is entered in the register in respect thereof." Art. 31 provided that "The instrument of transfer of any share shall be in writing in the usual common form, or in the following form, or as near thereto as circumstances will admit." Then followed a form of transfer which was substantially the same as that given in Table A to the First Schedule of the Companies Act, 1862.

Art. 33 was as follows: "Every instrument of transfer shall be left at the office for registration, accompanied by the certificate of the shares to be transferred, and such other evidence as the company may require to prove the title of the transferor or his right to transfer the shares."

In the course of his judgment, Joyce, J., said: "In my opinion the directors were not bound to register that transfer at the meeting on the 27th. It is well settled that, although directors may have no power to refuse to register a transfer, they are entitled to have a reasonable time after the transfer is made in order to make inquiries for the purpose of finding out if the transfer is in order; but, after being satisfied on this point, they are bound at the next meeting to register the transfer. But I consider that, after what had taken place in this case, the directors were not bound to pass the transfer at the meeting on the 27th. At all events, they did not then pass the transfer. In my opinion, if an application had been made under sect. 35 of the Companies Act, 1862, on November 27th to rectify the register, it could not have succeeded. It is established by *Société Générale de Paris v. Walker* (i), *Roots v. Williamson* (k) and *Moore v. North Western Bank* (l) that, where the articles are in the form in which they are in the present case, a legal title is not acquired as against an equitable owner before registration, or at all events until the date when the person seeking to register has a present absolute and unconditional right to have the transfer registered. I am not called upon to define the meaning of a 'present absolute and unconditional right,' but, as it appears to me, I am not sure that anything short of registration would do except under very special circumstances. At all events, I am of opinion that in this case, prior to the date of the injunction, the defendant, Hart, had not a 'present absolute and unconditional right' to the registration of the transfer of these shares, and that the prior equitable right of the plaintiff, Mrs. Ireland, must prevail."

The limitations upon the effect of registration may be gathered from the case of *Simm v. Anglo-American Telegraph Co.* (m). There C. owned stock in a company incorporated under the Com-

(i) See p. 794, *supra*.

(k) See p. 796, *supra*.

(l) See p. 798, *supra*.

(m) (1879), 5 Q. B. D. 188.

panies Act, 1862. His clerk, P., contracted to sell stock in the company to S., who was the nominee of B. In order to carry out the contract, P. forged a transfer from C. to S., which was left by S. at the office of the company for registration. The company sent a letter to C. inquiring whether the transfer was correct. As they received no answer from him, they registered the transfer. B. borrowed money from a bank, and by way of security for the loan the stock was transferred by S. at the request of B. to I. as trustee for the bank, and the company registered I. as owner, and issued a certificate accordingly. The money borrowed by B. was afterwards repaid by him to the bank, and the stock was held by I. as a bare trustee for B. The forgery was discovered, and the company then refused to acknowledge I. as the holder of the stock. In an action brought by B. and I. to compel the company to recognize their title, it was held that, although I., as trustee for the bank, might have acquired a good title by estoppel against the company, yet that title ceased when the loan by the bank was paid off, and that no estoppel existed in favour of B. against the company; for B. in contracting, through S., to buy the stock belonging to C. had acted on the faith of the forged transfer, and had not relied upon any act of the company, and by sending the forged transfer to the company had induced them to recognize his nominee as the holder, and that, accordingly, the action would not lie⁽ⁿ⁾.

In *Corporation of Sheffield v. Barclay* (o) the defendants, Messrs. Barclay & Co., the bankers, had presented for registration a transfer to their representative (as security for an advance) of stock issued by the plaintiff corporation, with a letter requesting the corporation to register the transfer and to send them a new certificate. One of the signatures to the transfer was in fact forged, though the defendants believed it to be genuine. The corporation, believing the transfer to be genuine, registered it, and issued a certificate to the defendants as holders of the stock. It was admitted that there was no negligence on the part of the corporation, and that the defendants acted *bonâ fide*. Soon after-

(n) This case was approved in *Balkis Consolidated Co. v. Tomkinson*, [1893] A. C. 396, at p. 412, and discussed in *Sheffield Corporation v. Barclay*, see next note,

and distinguished in *Dixon v. Kennaway & Co.*, [1900] 1 Ch. 833.

(o) [1903] 2 K. B. 580.

wards the stock was sold, and was transferred to the purchaser, who was duly registered as the holder. Some years afterwards the forgery was discovered, and the corporation were compelled to make good the loss to the original holder by purchasing other stock for him. The duties of the corporation as to the transfer of stock were regulated by private Act, the provisions of which were, in substance, the same as those of the Companies Act, 1862, with regard to the transfer of shares in companies formed under that Act.

It was held that, as the transfer to the defendants was registered and the certificate issued to them by the corporation in pursuance of their statutory duty, and not voluntarily by reason of a request by the defendants, there was no implied contract by the defendants to indemnify the corporation against the loss which they had sustained (*p*).

Liability incurred by Registration.—If the shares are not fully paid up, the banker, upon becoming registered in respect of them, will be liable as a member of the company (*q*). It is otherwise as to an equitable mortgagee: the register will not be rectified by the insertion of his name as a contributory (*r*).

Position Apart from Registration.

Although, as we have seen, the banker will not be fully secured until the stock or shares have been registered in the name of himself or his nominee, or he has acquired a present and unconditional right to such registration, nevertheless, in practice, he will generally be safe in advancing against a duly executed transfer accompanied by the certificates.

For a delivery of the certificates, together with a transfer duly executed by the mortgagor, passes to the banker a title which enables him to invest himself with the shares, without risk of his right being defeated meanwhile by any other person deriving

(*p*) Cf. *Anglo-American Telegraph Co. v. Spurling* (1879), 5 Q. B. D. 188, at p. 194; *Balkis Consolidated Co. v. Tomkinson*, [1893] A. C. 396.

(*q*) *Weikersheim's Case* (1873), 8 Ch.

831. See also *Price and Brown's Case* (1850), 3 De G. & S. 146; *Royal Bank of India's Case*, cited at p. 46, *supra*.

(*r*) *In re Joint Stock Discount Co.*, *Sichell's Case* (1867), 3 Ch. 119.

title from the registered owner. The mortgagor must either have intended to part with his interest (subject to the right of redemption), or have estopped himself from saying that he did not intend to pass it ^(s), and the banker's possession of the certificates prevents a subsequent equitable mortgagee obtaining priority ^(t).

But a certified transfer (without the certificates) has not the same effect.

Effect of Certificate.—In *In re Ottos Kopje Diamond Mines, Limited* ^(u), A. had bought from B. 4,300 shares in a company upon the faith of a share certificate issued by the company certifying that B. was the registered owner of 4,300 specified shares in the company. A. then tendered to the company a transfer from B. to himself duly executed, together with B.'s share certificate; but the company, having recently discovered that the certificate had been fraudulently obtained, refused to register the transfer. It was held (1) that, although the certificate was not a warranty of title upon which A. could maintain an action at common law against the company, it estopped the company from disputing A.'s right to be registered; (2) that A.'s cause of action arose from the refusal of the company to perform the duty of registering a transferee who had shown what the company were estopped from denying to be a good title; and (3) that the measure of damages was the value of the shares at the time of the refusal to register ^(v).

In *Colonial Bank v. Whinney* ^(x) a registered shareholder in an incorporated company deposited with his bank his share certificates, together with a blank transfer executed by himself as security for advances by the bank. Upon each certificate was a note, that in the event of sale or transmission the certificate must be surrendered with the deed of transfer before the transfer could be registered or a new certificate issued. The Companies Clauses Consolidation (Scotland) Act, 1845 (8 & 9 Vict. c. 17), to the provisions of

^(s) Per Lord Watson in *Colonial Bank v. Cady* (1890), 15 A. C. 267, at pp. 277-8, and per Lord Herschell in the same case at pp. 284-286; and per North, J., in *Bentinck v. London Joint Stock Bank*, [1893] 2 Ch. 120, at pp. 144-5.

^(t) Cf. pp. 725-731, *supra*.

^(u) [1893] 1 Ch. 618.

^(v) See also *Ruben v. Great Fingall Consolidated*, [1904] 1 K. B. 650; 20 T. L. R. 231.

^(x) (1886), 11 A. C. 426; 55 L. T. 362; 34 W. R. 705.

which the company was subject, by sect. 12 enacts that the certificate shall be *prima facie* evidence of title, but that the want of the certificate shall not prevent the holder of any share from disposing thereof; and, by sect. 14, requires the transfer of any share to be by deed. The shareholder having become bankrupt before the company received any notice of the deposit, it was held that, having regard to the note upon the certificates, the shares were not in the possession, order, or disposition of the shareholder under such circumstances that he was the reputed owner thereof within the meaning of the Bankruptcy Act, 1883, s. 44, sub-s. iii., and also that the shares were "things in action" within the meaning of the proviso in that sub-section (y).

Certified Transfer.—In permitting its secretary to certify transfers of shares, a company does not authorize him to do more than give a receipt for certificates of shares which are actually lodged in the office. If the secretary gives a receipt or an acknowledgment for certificates which have not been lodged, the company is not estopped from setting up the true facts.

In *George Whitechurch, Limited v. Cavanagh* (z) transfers of shares in a company having been lodged with the company's secretary without the certificates for the shares, the secretary fraudulently certified upon the transfers that the certificates for the shares were in the company's office. The proposed transferee having brought an action against the company for refusing to register him as the owner, it was held that the company was not estopped from showing that the proposed transferor had no shares to transfer, and that the action would not lie.

In the course of his speech in the House of Lords, Lord Macnaghten said: "Then comes the question, Is the company bound by the representations of their secretary? That must depend upon what authority the secretary had or was held out as having. Now, the duties of a company's secretary are well understood. They are of a limited and of a somewhat humble character. 'A secretary,'

(y) As to the quasi-negotiable character of Northern Pacific Railway Company certificates (indorsed with assignment in blank and power of attorney), see *Hone v. Boyle* (1891), 27 L. R. Ir. 137. *Sed quære* as to the decision in this case, as,

if the documents were not negotiable, it is difficult to see how a legal title had passed. Cf. p. 793, *supra*, and p. 812, *infra*.

(z) [1902] A. C. 117.

said Lord Esher, 'is a mere servant. His position is that he is to do what he is told, and no person can assume that he has any authority to represent anything at all': *Barnett v. South London Tramways Co.* (a). . . . No doubt the practice of certifying transfers is a convenient one. It facilitates dealing in shares on the Stock Exchange, and so tends indirectly to increase the value of shares as a marketable commodity. But in permitting its secretary to certify transfers it cannot be supposed that a company authorizes the secretary to do more than to give a receipt for certificates which are actually lodged in the office. I cannot think that a company is estopped by the certification of its secretary if he gives a receipt or an acknowledgment for certificates which have not been lodged with him. If authority be wanted for this proposition, it seems to me that there is ample authority to be found in the case of *Grant v. Norway* (b). *Grant v. Norway* was a much stronger case than the present. There it was held that a shipowner is not bound by bills of lading signed by the master for goods not received on board. The Court declared that it could not 'discover any ground upon which a party taking a bill of lading by indorsement would be justified in assuming that' the master 'had authority to sign such bills whether the goods were on board or not.' Having regard to the authority which the master undoubtedly possesses, and the important part which bills of lading play in the commerce of the country, there was much to be said in favour of an opposite view. It was argued in *Grant v. Norway* that the doctrine for which the shipowner was contending would go far to destroy the negotiability of bills of lading, and that as the master had an unlimited authority to sign bills for goods received, and was for some purposes regarded as the general agent of the owner, it was but just that the owner should be responsible if the master exceeded his authority or deceived third persons. But, for all that, the principle of the decision was accepted in *Coleman v. Riches* (c), and the decision itself has been recognized in this House as sound law: *McLean v. Fleming* (d); and the commerce of the country has not suffered nor has the credit of bills of lading been impaired in consequence. There is a marked difference between a certificate and a

(a) (1887), 18 Q. B. D. 815.

(b) (1851), 10 C. B. 665.

(c) (1855), 16 C. B. 104.

(d) (1871), L. R. 2 H. L. Sc. 128.

certification. A certificate is under the seal of the company. By the Companies Act, 1862, a certificate is made *prima facie* evidence of title. If faith were not given to the solemn assertions of a company under its common seal, 'it would,' as Lord Cairns observed in *Burkinshaw v. Nicolls* (e), 'paralyze the whole of the dealings with shares in public companies.' A certification stands on a different footing altogether. Transfers are never certified under the company's seal. There is no obligation on a company to certify transfers at all. The certification is not passed by the directors or brought before the board. A certification, in fact, is only required for a temporary purpose, to meet the exigencies of business on the Stock Exchange, which has stated days and fixed periods for the different stages of a business transaction intended to be carried out under its rules. In dealings in shares not under the rules of the Stock Exchange, a certification is really out of place. In such dealings, in the case of a purchase, the price would only be paid in exchange for the transfer and share certificate on the completion of the transaction, and not before. Still less would a certification be required if the shares were merely intended to form a security. A good equitable charge may be created by the deposit of certificates, and, if the certificates happened to include shares which were not intended to be the subject of the security, there would be no very great difficulty in defining the extent of the proposed charge in the memorandum of deposit. It seems to me that it would be most unreasonable in any case, whether the transaction takes place on the Stock Exchange or not, to hold a company estopped by the certification of its secretary if the secretary certifies a transfer without having received the certificates. The supposed estoppel, therefore, founded on Wells' certification, in my opinion, fails altogether; and for the same reason the case founded on alleged misrepresentation by the company fails also."

Notice.

The safety of the banker's position, even where he has acquired the legal estate, depends upon the absence of notice of a prior claim to the stock or shares on the part of a third person.

(e) (1878), 3 A. C. 1017.

The subject of notice has been already discussed above, at pp. 777—785. It may be further illustrated here by the following cases.

In *Locke v. Prescott* (*f*) bankers had advanced to customers 300*l.* to redeem some railway stock which had been transferred to another firm as a security for that sum. The stock was thereupon transferred in blank to the bankers. Subsequently the customers, in a letter to the bankers, stated that they had been requested by their “principal” to extend the term of the loan on the stock. The stock actually belonged to a third party, A. B. It was held that, after the receipt of this letter, the bankers had constructive notice of A. B.’s right to the stock, and that no subsequent advances made by the bankers to the customers could affect his right.

In *Bank of Montreal v. Sweeny* (*g*) R. held shares in a company in trust for the respondent. He transferred the shares, without the knowledge or consent of the respondent, to the manager of the appellant bank in trust for the bank, as security for a personal advance to himself. The transferee was aware that R. held the shares upon an undisclosed trust, but did not know who the *cestui que trust* was. It was held that there was a duty upon the bank to decline to accept the transfer until they had ascertained that it was authorized by the nature of R.’s trust, and that, in the absence of any such inquiry, they could not retain the shares against the prior title of the respondent.

Lord Chancellor Halsbury, delivering the judgment of the Privy Council, said: “The bank had express notice that, as regards the property transferred to them, Rose” (the customer) “stood to some person in the relation expressed by the words ‘in trust,’ and the only question is what duty was cast upon the bank by that knowledge. Their Lordships think it wrong to say that any less duty was cast upon them than the duty of declining to take the property until they had ascertained that Rose’s transfer was authorized by the nature of his trust. In fact, they made no inquiry at all about the matter, following, as Mr. Buchanan” (the bank manager) “says, the usual practice. So acting, they took the chance of finding that there was somebody with a prior

(*f*) (1863), 32 Beav. 261.

(*g*) (1887), 56 L. T. 897.

title to demand a transfer from Rose, and, as the plaintiff is such a person, they cannot retain the shares against her claim" (*h*).

On the other hand, the words "manager in trust," appended to the signature of a bank manager in a transfer-book, import that he held and transferred the shares in trust for his employers, the bank, and are not calculated to suggest that he stood in a fiduciary relation to some third person, so as to affect a transferee for value with constructive notice of such relationship, if it in fact existed (*i*).

In *Bentinck v. London Joint Stock Bank* (*k*) Herapath, Delmar & Co., stockbrokers, had been employed by a client to make for him from time to time on the London Stock Exchange speculative purchases and sales of stock, shares, and bonds. The brokers furnished him with money to enable him to pay for the purchases, and he authorized them to hold the purchased stocks, shares, and bonds as security for their advances, and also to repledge them. The brokers had a loan account with their bankers, with whom they deposited stock, shares, and bonds belonging to various clients *en bloc* as security for the bank's advances. The bank allowed the brokers to withdraw the deposited securities from time to time, as they required them, upon their depositing others of equal value. Ultimately the brokers became defaulters on the Stock Exchange, and were adjudicated bankrupts. At the date of the default there were in the hands of the bank various stocks and shares, and also some bonds payable to bearer, which the brokers had purchased for the client. The stocks and shares were transferable by deed in the ordinary way, and they had all been transferred to, and were registered in, the names of trustees for the bank. Some of the transfers were made by the client himself, some by the brokers, and some by third parties. Those which were made by the client were expressed to be for a nominal consideration; the others were expressed to be for full value. The bonds passed by delivery on

(*h*) With regard to the kind of circumstances which would have the effect of putting a banker upon inquiry as to the ownership of securities pledged with him, see *Mulville v. Munster and Leinster Bank* (1891), 27 L. R. Ir. 379; *Collis v.*

Hibernian Bank (1893), 31 L. R. Ir. 261. See also Part II. Chap. 3.

(*i*) *London and Canadian Loan and Agency Co. v. Duggan*, [1893] A. C. 506.

(*k*) [1893] 2 Ch. 120.

the Stock Exchange, and were always there treated as negotiable. The client claimed to be entitled to redeem the securities on paying to the bank the amount which was due from himself to the brokers, whereas the bank claimed to hold the securities until payment of a larger amount which was due to them from the brokers. The client asserted that the authority which he had given to the brokers to repledge his securities authorized them to do so only for an amount not exceeding what was due from himself to them.

Mr. Justice North held that there was nothing to lead the bank to suppose that the stocks and shares which were transferred to their trustees were not the brokers' own property, and that the bank must therefore be treated as *bonâ fide* holders for value without notice, and their legal title could not be impeached; and that consequently the client could not redeem without paying the amount which was due from the brokers to the bank. The learned judge further held that, as to the stocks and shares of which the client had himself executed transfers, he was estopped from denying that the brokers had authority to pledge them to the bank for their full value, and, as to the bonds, that they were negotiable securities, and, accordingly, the client could not redeem them without paying the amount due from the brokers to the bank on the principle of *London Joint Stock Bank v. Simmons* (l).

In the course of his judgment, his Lordship said (m): "The evidence as to 'contango' transactions is this—I am only giving a short *résumé* so far as it is now material—when a client directs a broker to buy stock for which the client is not himself finding the money to pay at the time, the money is provided by the broker, and he borrows the money for the purpose. This is done sometimes, no doubt, by a pure and simple loan; but in a very large majority of cases, amounting, according to the evidence of Mr. Grant, the official assignee of the Stock Exchange, to sixteen-twentieths of the whole business on the Stock Exchange, and, according to Mr. Powell's evidence, to nineteen-twentieths of the whole business, the thing is done by the broker finding the money on 'contango,' and then what happens is this: he is treated, not as the mortgagee or pledgee of the shares for the money which he

(l) See pp. 782—785, *supra*.

(m) At pp. 140-1.

advances, but he becomes by contract the purchaser of the shares out and out, and they become his own property. The shares are not yet transferred to him—he does not acquire any legal interest in them; but, as between the client on whose account he has bought them on the one hand, and himself on the other, when he finds the money on ‘contango’ he becomes the absolute owner of the property, subject, however, to a contract made at the same time, or part of the same contract, that he is to re-sell to the client a like amount, not the same identical shares, but a like amount of similar shares, usually on the next account day, although a later day may be fixed by arrangement, at a price larger than that for which he gave his client credit on the first occasion, because the enhanced price is to cover interest upon the money in the meantime. Therefore, in fact, these ‘contango’ transactions, although they are constantly treated as loans of money, even by persons who are thoroughly familiar with the business, although they are popularly spoken of, even on the Stock Exchange and by members of the Stock Exchange, when they come before the Court, as loans, yet, when the transaction is regarded from a legal point of view, it is not a loan on the client’s security, but is a sale by which the broker becomes entitled to the security as his own, although he is subject to a contract to re-sell to the client, not the same, but an equal amount of similar shares or stock at a future date. In all these transactions, therefore, when money is borrowed from a stockbroker on ‘contango’ or ‘continuation,’ whether the money is obtained from the dealer or from other stockbrokers, or from bankers, the result is the same: the arrangement is one by which the broker becomes, as between himself and his client, the owner of the shares in question, although he is under a contract to provide an equal amount of similar shares at a future date. This being the nature of the business between the parties, the reason why these ‘contangos’ or ‘continuations’ are often called loans is quite clear; but this does not alter the legal position of the parties concerned in them, or prevent the shares held by the brokers under such circumstances from being their own and available by them. And, when we find what a large amount of business is done in that way, there is ample ground upon which the officers of the bank might come to the conclusion that shares or

stocks which were held by the brokers were within their absolute power, even if they were not their own ; and, therefore, any doubt or suspicion which might otherwise have arisen in the mind of an officer of the bank would be at once quelled and allayed by his knowledge of the course of business. Therefore, I cannot say that it was brought to the attention of the bank or their officers that any one but the brokers had an interest in any one of these securities. The evidence of independent witnesses establishes that this state of things which I have endeavoured to explain has been existing, and has been matter of ordinary knowledge and of ordinary business on the Stock Exchange, for many years past, and I cannot say that the bank were not entitled to have regard to it" (n).

Where shares have been transferred as security for a loan, a derivative transferee from the lender will not be affected by a trust in favour of the original transferor and borrower, unless such trust is disclosed on the face of the title of the original lender, or is otherwise notified to the derivative transferee (o).

Deposit without Transfer.

Where the banker has not obtained a transfer in the manner dealt with above, he will usually, so far as his security is concerned, be able to rely, as equitable mortgagee, only upon the deposit of the certificates.

Preliminary Inquiry.—A certificate of shares is merely a solemn affirmation, under the seal of the company, that a certain amount of stock stands in the name of the individual mentioned in the certificate. It is incumbent upon a person receiving a certificate as an equitable mortgage to inquire what is the real position of the person pretending to mortgage it, for if such person has only the legal title, and is, in truth, merely the trustee for another, the equitable mortgagee will be unable to enforce his claim in opposition to the original *cestui que trust*.

(n) As to the nature of contango transactions, see also per Lindley, L. J., in *Bongioranni v. Société Générale* (1886), 54 L. T. 320.

(o) *London and Canadian Loan and Agency Co. v. Duggan*, [1893] A. C. 506.

In *Shropshire Union Railways and Canal Co. v. The Queen* (*p*) H. was the banker of a railway company, and was also one of its directors. Under certain business arrangements of the company he was entrusted with the possession of certificates which represented shares, and those shares he held as trustee for the company. He converted the shares, and the conversion being noticed he gave an explanation, replaced the shares, and continued to hold the certificates as before, and stood on the register as the apparent owner of them. He borrowed money of R., and deposited the certificates with R., who held them for some time, and died without having taken any step to be registered as the owner of the shares. R.'s widow and executrix applied to be registered as the owner, and, her application being refused, moved for a mandamus to compel registration. It was held that this was the ordinary case of a trustee abusing his trust; that if R. had made proper inquiries he would have found that H. was only a trustee; that negligence sufficient to affect their equitable title could not be imputed to the directors and the company, and that, consequently, the equitable title of R. could not prevail against the earlier equitable title of the company (*q*).

In *Colonial Bank v. Cady and Williams*, and *London Chartered Bank of Australia v. Cady and Williams* (*r*), the registered owner of shares in a New York railroad company held certificates which stated that the shares were held by him and were transferable in person or by attorney on the books of the company only on the surrender and cancellation of the certificate by an indorsement thereof. The indorsement was in the form of a transfer for value received, blank in the names of the transferor and transferee, with a power of attorney in blank to carry out the transfer. On the death of the owner his executors obtained probate of his will, and, in order that the shares might be registered in their own names, signed as executors the transfers on the back of each certificate, without filling up the blanks, and sent the certificates to their broker, who fraudulently deposited the certificates with a bank, which took

(*p*) (1875), 7 E. & I. A. 496.

(*q*) This case was discussed in *Carrutt v. Real and Personal Advance Co.* (1889), 42 Ch. D. 263; and *Lloyds Bank, Ltd.* v.

Bullock, [1896] 2 Ch. 192. Cf. also *Rimmer v. Webster*, [1902] 2 Ch. 163.

(*r*) (1890), 15 A. C. 267.

them *bonâ fide* and without notice as security for advances. The bank retained the certificates and took no steps to obtain registration. By the law of New York such a delivery of signed transfers by the registered owner of shares would estop him from setting up his title against a purchaser for value without notice. But neither on the New York nor on the London Stock Exchange are transfers so signed by executors treated as being in order, or received as sufficient security for advances, unless duly authenticated. The executors having brought an action against the bank to establish their title to the certificates, it was held that, since all the dealings with the certificates were transacted in England by persons domiciled there, the respective rights of the executors and the bank must be determined by English law; and that the conduct of the executors in delivering the transfers was consistent either with an intention to sell or pledge the shares, or to have themselves registered as the owners, and therefore did not estop them from setting up their title as against the bank, for the bank ought to have inquired into the broker's authority (s).

Priority.—As between successive equitable mortgages or charges of stock or shares, priority will be determined by the date of their creation, and not, as in the case of ordinary choses in action (t), by notice to the company.

Notice to Company.—The Companies Act, 1862 (u), provides as follows:—

30. No notice of any trust, expressed, implied or constructive, shall be entered on the register, or be receivable by the registrar in the case of companies under this Act and registered in England or Ireland.

As to railway and other public companies, sect. 20 of the Com-

(s) See p. 797, *supra*. Cf. *Samuel Montagu & Co. v. Weston, &c. Railways Co.* (1903), 19 T. L. R. 272, where a Lloyd's bond, issued by the defendant company to D., was deposited by him with C., together with a signed transfer in blank, under an arrangement whereby C. was to be entitled to transfer

the bond only in an event which did not happen. C., however, handed the bond and the transfer to the plaintiffs as security for advances. Bigham, J., held that the plaintiffs could not recover the amount due on the bond.

(t) As to this, see pp. 838—840, *infra*.

(u) 25 & 26 Vict. c. 89.

panies Clauses Act, 1845 (*x*), and as to other companies usually the terms of their special Act or charter, grant a similar immunity to the company from any obligation to recognize trusts (*y*).

The practical effect of this section appears to be, that there is no obligation upon the company to accept, or to preserve any record of, notices of equitable interests or trusts, if actually given or tendered to them, and that any such notice, if given, will be absolutely inoperative to affect the company with any trust. Such a notice cannot therefore perfect an equitable title or give it priority (*z*).

Notice to the company is, however, effectual for the purpose of giving the banker priority over a charge claimed in respect of subsequent advances by the company to the mortgagor.

In *Bradford Banking Company v. Briggs* (*a*) the articles of association of a company registered under the Companies Act, 1862, provided that the company should have "a first and permanent lien and charge, available at law and in equity, upon every share for all debts due from the holder thereof." A shareholder deposited his share certificates with a bank as security for the balance due and to become due on his current account, and the bank gave the company notice of the deposit. The certificates stated that the shares were held subject to the articles of association. It was held that the notice to the company of the deposit with the bank was not a notice of a trust within the meaning of the Companies Act, 1862, s. 30, and that the bank by giving notice of the deposit did not seek to affect the company with notice of a trust, but only to affect the company in their capacity as traders with notice of the interest of the bank; and, accordingly, that the company could not, in respect of moneys which became due from the shareholder to the company after notice of the deposit with the bank, claim priority over advances by the bank made after such notice (*b*).

(*x*) 8 & 9 Vict. c. 16.

(*y*) See, as to the Bank of England, pp. 119—120, *supra*.

(*z*) Per Lord Chancellor Selborne in *Société Générale de Paris v. Walker* (1885), 11 A. C. 20, at p. 30, cited at p. 794, *supra*.—As to the effect of this section, see *Ex parte Stewart, In re Shelley* (1864),

4 De G. J. & S. 543; 34 L. J. Bank. 6; 13 W. R. 356; and the discussion of this case in *Société Générale de Paris v. Tramways Union Co.* (1884), 14 Q. B. D. 424; affirmed *sub nom. Société Générale de Paris v. Walker*, see this note, *supra*.

(*a*) (1886), 12 A. C. 29.

(*b*) See pp. 715, 724, 739, *supra*.

In *Christie v. Taunton, Delmard, Lane & Co., In re Taunton, Delmard, Lane & Co.* (c), in March, 1890, T., who held shares and debentures in a company, deposited debentures with the plaintiffs, who were bankers, to secure a debt. The debentures were not on the face of them payable until the 31st of December, 1890; but by the indorsed conditions, in the event of the winding-up of the company, the principal moneys secured by the debentures became immediately due and payable. On the 3rd of November, 1890, a call was made upon T.'s ordinary shares payable on the 20th of November. By the articles of the company this call was deemed to have been made at the time when the resolution to make it was passed. On the 6th of November, 1890, the plaintiffs gave the company notice of T.'s assignment, and such notice was entered by the company on the register of debentures. On the 12th of November the plaintiffs commenced a debenture-holders' action against the company, and on the 19th of November the company went into voluntary liquidation. In the winding-up further calls were made upon T.'s shares. Upon a summons taken out by the plaintiffs in the action and in the winding-up, the company claimed the right to set off the calls due from T. as against the sum due upon the debentures. It was held that in respect of the call made before the winding-up the company were entitled to set-off; but in respect of the calls made in the winding-up they were not so entitled.

Shares, at all events when transferable by deed, are choses in action, and, accordingly, notice to the company is not necessary to prevent them being within the order and disposition of the mortgagor, in the event of his bankruptcy, within the meaning of sect. 44 (iii) of the Bankruptcy Act, 1883 (d).

Rights of the Banker.

Express powers of realization are commonly given to the banker by the deed or memorandum executed by the customer.

Apart from such provision, a mortgagee of shares (even where the mortgage is not effected by a deed) has an implied power to

(c) [1893] 2 Ch. 175.

(d) *Colonial Bank v. Whinney*, see

p. 803, *supra*. Cf. *Ex parte Dobson* (1842), 6 Jur. 917.

sell the shares on default by the mortgagor in payment of the amount due at the time appointed for payment, or, if no time be fixed, then on the expiration of a reasonable notice by the mortgagee requiring payment on a day certain. A month's notice, or even less, would be a reasonable notice (*e*).

The banker will also be entitled, even where there has only been a deposit of the certificate of shares, without either a transfer or a memorandum, to an order for foreclosure and transfer (*f*). The right to foreclosure will exist although the interest of the mortgagee is only equitable or reversionary (*g*).

If the banker, when only equitable mortgagee, learns of a contemplated transfer in fraud of his own interest, he may obtain an injunction (*h*).

Statute-Barred Debt.—Where a bank had an equitable charge on shares in a limited company to secure a simple contract debt, and after the debt was barred brought an action to enforce their security by foreclosure or sale, it was held that the bank were not deprived of their remedy against the property by the fact that the personal remedy for the debt was barred, and that, there being no Statute of Limitations applicable to foreclosure of a mortgage of personal property, the security was enforceable (*i*).

Proceeds of Security.—The banker's right to the proceeds of his security, when realized, will, of course, be limited to the amount due to him in respect of his advances. This is illustrated by the following case.

In *Mutton v. Peat* (*k*) stockbrokers had two accounts with their bankers—a current account and a loan account. The brokers became defaulters on the Stock Exchange on January 13th, and

(*e*) *Deverges v. Sandeman, Clark & Co.*, [1902] 1 Ch. 579; *Tucker v. Wilson* (1714), 1 P. Wms. 261.

(*f*) *Harrold v. Plenty*, [1901] 2 Ch. 314. See also *General Credit and Discount Co. v. Glegg* (1883), 22 Ch. D. 549; *Sadler v. Worley*, [1894] 2 Ch. 170; and the cases referred to in note (*t*) on p. 823, *infra*.

(*g*) *Slade v. Rigg* (1843), 3 Ha. 35; *Wayne v. Hanham* (1851), 9 Ha. 62; and cases cited in last note. Cf. *Stam-*

ford, Spalding and Boston Banking Co. v. Ball (1862), 4 De G. F. & J. 310.

(*h*) *Société Générale de Paris v. Tramways Union Co.* (1884), 14 Q. B. D. 424, at p. 453; see note (*z*) on p. 814, *supra*; *Simpson v. Molson's Bank*, [1895] A. C. 270, at p. 279. See also *Binney v. Ince Hall Coal, &c. Co.* (1866), 35 L. J. Ch. 363.

(*i*) *London and Midland Bank v. Mitchell*, [1899] 2 Ch. 161.

(*k*) [1900] 2 Ch. 79.

were on January 24th adjudicated bankrupts. At the time of their stoppage there was on the current account a balance of 1,362*l.* 10*s.* to their credit, and a balance of 7,500*l.* was due from them to the bankers on the loan account. They had deposited with the bankers as security bonds and shares belonging to some of their clients. This deposit was made without the authority of the clients, but the bankers did not know that the deposited securities were not the property of the brokers. The deposit was made to secure the general indebtedness of the brokers to the bankers, and not merely their indebtedness on the loan account. After the stoppage of the brokers, the bankers realized the deposited securities, the proceeds of which were, together with interest until sale, more than sufficient to cover the balance due on the loan account, and there remained in their hands a sum exceeding the credit balance on the current account. It was held that the two accounts must be treated as one, and that it was the duty of the bankers to apply the 1,362*l.* 10*s.* due from them on the current account in reduction of the 7,500*l.* due to them on the loan account, and to use the deposited securities to satisfy only the difference between those two balances; and that, therefore, the sum remaining in the bankers' hands belonged to the owners of the deposited securities (*l*).

Lindley, M. R., in the course of his judgment, said: "What was the plaintiff's position? His bonds had been deposited with the bankers in December, 1895. But what were the terms of that deposit? Everything in this case turns, as it seems to me, upon that. There was no special agreement in writing about it; the bonds were deposited as security for the indebtedness of Tatham & Co. to the bankers. The bonds were a security to the bankers for what Tatham & Co. owed them, including, of course, what Tatham & Co. owed them on the loan account. The important thing, and, to my mind, the key to the case, is this, that there was no agreement, at the time when the bonds were deposited, that the two

(*l*) It also appeared that two days before the stoppage of the brokers a client had sent them a cheque to pay for some stock which they had purchased for him. This cheque was paid to their current account, and the amount of it formed part of the 1,362*l.* 10*s.*

The purchase was not completed by the brokers. It was held that the client had no equity as against the owners of the deposited securities to be repaid the amount of his cheque out of the 1,362*l.* 10*s.*

accounts—the loan account and the current account—should be kept separate, so that the indebtedness for which the bonds were deposited should be ascertained by looking at the loan account alone. In other words, there was no agreement to the effect that the deposited bonds should be a security for anything except that which, on taking an account between Tatham & Co. and the bankers, under all heads of account between them, should ultimately be found due from Tatham & Co. to the bankers. . . . What, then, are the rights of the plaintiff as regards his bonds? He does not deny the right of the bankers to treat the bonds as security for the amount of the indebtedness of Tatham & Co. What is that amount? It is the amount, taking the deposit account and current account together (you cannot separate them), which is due to the bankers on the two accounts. With that amount his bonds must stand charged. I do not care how the bankers may have manipulated their books or how many accounts they may have kept. When you come to ascertain what is the amount due from Tatham & Co. to the bankers the question admits of only one solution—it is the balance due on the loan account after deducting the 1,362*l.* 10*s.* The plaintiff says, ‘Give me the proceeds of my bonds when that balance has been satisfied.’ What answer can the respondents have to that claim? This is one of those unfortunate cases in which the Court has to decide on which of several innocent persons a loss must fall; but when once you grasp the principle that the bonds were deposited for the amount which Tatham & Co. should be found to owe to the bankers, it is impossible to say that that amount is to be ascertained in any other way than by setting the one account against the other. It is the right of the owner of the deposited bonds to have that done and to say, ‘You cannot hold my bonds except as security for the ultimate balance due to you.’ There is no answer to this claim, and neither of the respondents has any right to dispute it. It is no answer to say that, looking at the accounts as they have been kept, you will find that the respondents’ moneys are still in the hands of the bankers.”

Redemption.

Every mortgagor or pledgor has a right of redemption (*m*).

The rule prohibiting the clogging of the equity of redemption applies to a mortgage by a limited company as well as to a mortgage by an individual (*n*).

In *Jarrah Timber and Wood Paring Corporation v. Samuel* (*o*) a loan was made to a limited company on the terms of a letter whereby the borrowers agreed to secure the repayment of the loan with interest by the transfer of certain redeemable debenture stock of the company, and it was stipulated that the lender should have the option of purchasing the whole or any part of the debenture stock at 40 per cent. at any time within twelve months, and that the advance should become due and payable with interest at thirty days' notice on either side. It was held that the stipulation giving the option to purchase the mortgaged stock was a clog or fetter on the right of redemption, and therefore void (*p*).

A tender of the amount due is a condition of redemption.

In *Donald v. Suckling* (*q*) A. had deposited debentures with B. as a security for the payment at maturity of a bill indorsed by A. and discounted by B., and agreed that B. should have power to sell or otherwise dispose of the debentures if the bill should not be paid when due. Before the maturity of the bill, B. deposited the debentures with C., to be kept by him as a security until the repayment of a loan from C. to B. larger than the amount of the bill. The bill was dishonoured, and, while it still remained unpaid, A. sued C. to recover the debentures. It was held that the repledge by B. to C. did not put an end to the contract of pledge between A. and B. and B.'s interest and right of detainer under it, and that A., therefore, could not maintain an action of detinue without having paid or tendered the amount of the bill (*r*).

If the mortgagee of stock sells it before the day fixed for repayment of the loan, he must answer for the consequences to the mortgagor on his tendering repayment in due time. Moreover, if he has

(*m*) See pp. 718, 731, *supra*.

(*n*) See case next cited.

(*o*) [1903] 2 Ch. 1.

(*p*) See *Noakes & Co. v. Rice*, [1902] L. R. 3 Ex. 299.

A. C. 24.

(*q*) (1866), L. R. 1 Q. B. 585.

(*r*) See also *Halliday v. Holgate* (1868),

repurchased a similar quantity of the same stock at a lower price, he must account to the mortgagor for the profit (*r*).

SECTION VI.

LIFE POLICIES.

A policy of life assurance is sometimes treated as a substantive security in itself; at others as a supplementary security to complete the efficacy of a security upon property of another kind, such as a life interest.

When mortgaged alone it is desirable, in the interest of the mortgagee, that sureties for the payment of the interest of the loan and the premiums of the policy should concur in the deed.

Policy in Banker's Name.

A creditor may take out a policy of insurance upon his debtor's life in his own name. If it is agreed that the debtor shall pay the premiums, he should, of course, covenant to do so in due form. If it is intended that, subject to the satisfaction of the debt, the policy shall enure for the benefit of the debtor or his representatives, this should also be the subject of express provision.

But, in the absence of evidence of the express or implied agreement of the parties as to redemption, if it is proved that the creditor agreed to effect the policy and the debtor agreed to pay the premiums, the policy, subject to the debt, will be held by the creditor in trust for the debtor. Otherwise the creditor will be entitled (*s*). The result will be similar where the policy is effected on the life of a surety (*t*).

Where the policy is effected in the banker's name, he will not incur the risk of its avoidance under the usual clause relating to suicide by the assured (*u*).

(*r*) *Langton v. Waite* (1869), 4 Ch. 158; *Preston v. Neele* (1879), 12 Ch. D. 402. 760.

(*s*) *Bruce v. Garden* (1869), 5 Ch. 32; (*t*) *Bell v. Ahearne* (1849), 12 Ir. Eq. *Salt v. Marquess of Northampton*, [1892] R. 576.

A. C. 1. See also *Martin v. West of England, &c. Co.* (1858), 4 Jur. N. S. 437. (*u*) Cf. *Clift v. Schwabe* (1846), 3 C. B.

Policy in Debtor's Name.

Conditions of Validity.—Where the policy which is proposed to be the subject of a mortgage has been effected by the debtor in his own name, certain preliminary considerations arise.

I. It is generally provided that the validity of a policy shall depend upon the accuracy of the representations made by the assured to the insurance company when applying for the policy, whether they are material or not, and, even if such a provision were absent, the policy would be liable to be avoided on the ground of the falsehood of material statements made upon such application.

Accordingly the value of the policy as a security will depend upon the statements made by the assured.

II. If the policy is not an insurance of the life of the person in whose name it is taken out, it will be valid only if, and to the extent that, the latter had an insurable interest in the life of the former (*x*).

The interest must be a pecuniary interest (*y*).

A creditor has an insurable interest in the life of his debtor, even though he has taken security for the debt; and so has a surety (*z*).

A wife has an insurable interest in the life of her husband (*a*). But a husband has not such an interest in the life of his wife (*b*); nor has a parent in the life of a child (*b*), nor a child in that of a parent, unless he is, or has a right to be, supported by him (*c*).

A creditor who has an interest at the time of effecting an insurance upon the life of his debtor, will not lose his right by reason of the interest ceasing by payment of the debt (*d*).

(*x*) 14 Geo. 3, c. 48, ss. 1, 2, 3.

(*y*) *Halford v. Kymer* (1830), 10 B. & C. 724; *Hebdon v. West* (1863), 3 B. & S. 579. Cf. *Barnes v. London, Edinburgh and Glasgow Life Insurance Co.*, [1892] 1 Q. B. 864.

(*z*) *Lea v. Hinton* (1854), 5 De G. M. & G. 823. See *Preston v. Neele* (1879), 12 Ch. D. 760, at p. 770.

(*a*) *Reed v. Royal Exchange Assurance Co.* (1796), Peake's Add. Cas. 70.

(*b*) *Halford v. Kymer* (1830), 10 B. & C. 724; *Henson v. Blackwell* (1845), 4 Ha. 434.

(*c*) See *Shilling v. Accidental Death Insurance Co.* (1857), 2 H. & N. 42; 27 L. J. Ex. 16; 5 W. R. 567; 1 F. & F. 116; *Harse v. Pearl Life Assurance Co.*, [1904] 1 K. B. 558.

(*d*) *Anderson v. Edie* (1795), 2 Park on Marine Ins. 640; *Dalby v. India and London Life Assurance Co.* (1854), 15 C. B. 365; 24 L. J. C. P. 2.

III. The policy may be avoided if the assured dies by the hands of justice (*e*), or commits suicide while of sound mind (*f*). If it expressly provides that it shall be void if the assured shall die by his own hands, or if it provides that it shall be void if he commits suicide, it will be avoided by suicide while of unsound mind (*g*).

A policy may, however, effectually provide that, if the assured should die by his own hands or the hands of justice, it shall remain in force to the extent of any interest therein acquired by another person for value (*h*). Even though the protection is only expressed to be in favour of one to whom the policy has been legally assigned, it will extend to a creditor with whom the policy has been deposited for security (*i*).

Mortgage by Assignment.—The proper mode of effecting a mortgage of a policy in the name of the debtor is by a deed assigning the policy to the banker subject to a proviso for redemption, and containing covenants by the debtor to keep up the policy and not to do any act by which the policy may be avoided; a provision that, upon default by the debtor, the banker may pay the premiums and add their amount to the principal debt secured, and a clause empowering the banker to surrender the policy to the insurance office.

Notice of Assignment.—The Policies of Assurance Act, 1867 (*k*), makes special provision as to notice of assignment.

Upon completion of the assignment the banker should at once give notice in writing of its date and purport to the assurance company at their principal place of business for the time being, or in case they have two or more principal places of business (*l*), then at some one of them (*m*). At the request in writing of the banker, and upon payment of a fee not exceeding 5s., the company must

(*e*) *Amicable Society v. Bolland* (1830), 4 Bl. N. S. 194.

(*f*) *Moore v. Woolsey* (1854), 4 El. & Bl. 243.

(*g*) *Borradaile v. Hunter* (1843), 5 M. & G. 639; *Clift v. Schwabe* (1846), 3 C. B. 437. See also *Dufaur v. Professional Life Assurance Co.* (1858), 25 Beav. 599; *Ellinger & Co. v. Mutual Life Insurance Co.*, [1904] 1 K. B. 832; 20 T. L. R. 368.

(*h*) *Moore v. Woolsey* (1854), 4 El. & Bl. 243.

(*i*) *Dufaur v. Professional Life Assurance Co.*, see note (*g*), *supra*; *Jones v. Consolidated Investment Assurance Co.* (1858), 26 Beav. 256; *Moore v. Woolsey*, see last note.

(*k*) 30 & 31 Vict. c. 144.

(*l*) *Sic*.

(*m*) See sect. 3.

deliver an acknowledgment in writing under the hand of the manager, secretary, treasurer, or other principal officer. An acknowledgment signed by a person *de jure* or *de facto* filling any such position will be conclusive evidence against the company of due receipt of the notice (*m*).

Any payment made by the company in respect of the policy in good faith before receiving notice of an assignment will be valid against the assignee (*n*).

After giving such notice the banker will be in a position to sue in his own name to recover the moneys assured, when due (*o*). Priority as between two or more assignees will be determined by the date of the receipt of notice by the company (*p*). The power of the mortgagor to surrender the policy will also cease upon the receipt of notice.

A notice will be effective as from the date of its receipt, although given after the death of the assured (*q*).

Where notice of an assignment by way of mortgage has been received by an insurance office, if the representatives of the assured demand payment, the office is entitled to evidence of the satisfaction of the mortgage (*r*).

Mortgage by Deposit.—A deposit of the policy, even though accompanied by a memorandum of agreement to execute a deed of assignment by way of mortgage, does not amount to an assignment within the meaning of the Policies of Assurance Act, 1867 (*s*). In such a case, however, the deposittee will be able to claim the ordinary rights of an equitable mortgagee (*t*).

The object of the provisions of the Act as to notice is to avoid

(*m*) See sect. 6.

(*n*) See sect. 3.

(*o*) See sects. 1, 3.

(*p*) See *In re Lake, Ex parte Cavendish*, [1903] 1 K. B. 151; 19 T. L. R. 116. Cf., however, the cases cited *infra*, on this and the following page.

(*q*) *In re Russell's Policy Trusts* (1872), 15 Eq. 26.—As to life policies of friendly societies, see *In re Griffin*, [1902] 1 Ch. 135.

(*r*) *In re Haycock's Policy* (1876), 1 Ch. D. 611; followed in *In re Sutton's*

Trusts (1879), 12 Ch. D. 175. Cf. 59 & 60 Vict. c. 8.

(*s*) See p. 822, *supra*.

(*t*) *Crossley v. City of Glasgow Life Assurance Co.* (1876), 4 Ch. D. 421; *Spencer v. Clarke* (1878), 9 Ch. D. 137; *Webster v. British Empire Mutual Life Assurance Co.* (1880), 15 Ch. D. 169; *Curtius v. Caledonian Fire and Life Insurance Co.* (1881), 19 Ch. D. 534; *Scottish Amicable, &c. Society v. Fuller* (1867), Ir. R. 2 Eq. 53. Cf. the cases referred to in note (*f*) on p. 816, *supra*,

the necessity of joining the assignor in actions against the office, and to enable the office to recognize as the first claim that of the person who first gave the prescribed notice. The words as to priority of claims under assignments are not intended to affect the rights of persons claiming interests in the money outside the insurance office; or to enact that a person who has advanced money upon a second charge, with notice of the first and made subject to it, should, by giving notice, exclude the prior incumbrancer, and they have not this effect (*u*).

Accordingly, notice of an agreement to execute on request an effectual mortgage of a policy stated to be, but not in fact, deposited as security for a loan, does not give under the Act any priority over a prior equitable mortgagee who has given no notice, but has possession of the policy.

In *Spencer v. Clarke* (*x*) the holder of a policy of insurance on his own life deposited it with A. by way of equitable mortgage to secure a loan. A. retained the policy, but gave no notice to the company. B. afterwards, in ignorance of this prior mortgage, agreed to lend money to the policy-holder upon a deposit of the same policy, and the policy-holder, alleging that he had left the policy at home by mistake, and promising forthwith to deliver it to B., took the loan and signed a memorandum that he had deposited the policy with B., and that he undertook on request to execute to B. an effectual mortgage of it. B. gave to the company notice of his loan and memorandum of deposit, and frequently applied to the policy-holder for the policy, but the policy-holder made various excuses for not handing it over, and died leaving it in the possession of A. It was held that the circumstances of the case were such as to put B. on inquiry at the time of the loan, and to fix him with constructive notice of A.'s security, and that the title of A., as in possession of the policy, must prevail over that of B., although B. did and A. did not give notice to the company.

In *In re Wallis, Ex parte Jenks* (*y*), in March, 1901, one Wallis deposited a policy of assurance on his own life with his wife as security for advances made by her to him. No notice of this

(*u*) *Newman v. Newman* (1885), 28 Ch. D. 674.—As to the rule of priority as between successive incumbrancers, see pp. 838—840, *infra*.
 (*x*) (1878), 9 Ch. D. 137.
 (*y*) [1902] 1 K. B. 719.

equitable charge was given to the assurance society. On October 11th, 1901, a receiving order was made against Wallis on his own petition, and the same day adjudication followed. On October 16th the Official Receiver gave notice of the receiving order to the assurance society. On October 30th Jenks was appointed the trustee in the bankruptcy, and claimed, as against the wife, to be entitled to the policy as part of the property of the bankrupt, free from incumbrances. Wright, J., dismissed the application, on the ground that a trustee in bankruptcy, being under the bankruptcy laws only statutory assignee of the bankrupt's choses in action, subject to all equities existing therein at the date of the commencement of the bankruptcy, cannot obtain priority over a good equitable mortgagee thereof for value merely by giving notice before the mortgagee.

Accordingly, if no assignment is executed, the banker should be careful to secure possession of the policy (z).

SECTION VII.

CHOSSES IN ACTION GENERALLY.

Assignability.

The right to the payment of a sum of money—whether an ordinary debt (a), or a legacy, or an interest in a trust fund—may, as a general rule, be mortgaged.

Even future debts may be assigned, if they are capable of being identified, as and when they come into existence (b).

In the case of an assignment of book debts, it is not necessary that it should be limited to the future book debts of a particular business (b).

(z) As to payment of insurance moneys into Court by the office where the policy has been lost, see *Harrison v. Alliance Assurance Co.*, [1903] 1 K. B. 184; 19 T. L. R. 89.

(a) As to the equitable assignment of

part of a debt, see *In re Montgomery Moore, &c. Syndicate* (1903), 72 L. J. Ch. 624; 19 T. L. R. 554; W. N. 121.

(b) *Taitly v. Official Receiver* (1888), 13 A. C. 523. Cf. *Western Wagon and Property Co. v. West*, [1892] 1 Ch. 271, cited at p. 837, *infra*.

Where a debt, which is to become due by instalments for work to be done, is assigned, and the mortgagor becomes bankrupt, the banker will be entitled to whatever has been earned up to the time of the bankruptcy (*e*). But if the mortgagor has assigned the future receipts of his business, the mortgagee will not be entitled to the receipts accruing after the bankruptcy against the trustee in bankruptcy (*d*).

There is nothing in the Companies Acts prohibiting a limited company from mortgaging its unpaid-up capital. Accordingly, where power to mortgage future or unpaid-up capital is given by the memorandum or articles of association, a mortgage by the company of its future or uncalled capital is valid even as against creditors in a winding-up; the calls in a winding-up being part of the "assets" or "capital" of the company (*e*).

Certain rights are, however, incapable of assignment, either by way of mortgage or otherwise.

This is the case with the right to salary or pay on the part of a public or military officer, payable to him in order to enable him to keep up the dignity of his office or to discharge his duties (*g*); and alimony and maintenance after divorce (*h*).

Moreover, an assignment will be invalid if it partakes of the nature of champerty or maintenance (*i*). But a mortgage of the subject-matter of an action *pendente lite* may hold good for the sums actually advanced by the mortgagee with interest (*k*).

If an assignment comes within the meaning of a "bill of sale" (*l*), it will be invalid unless registered as such (*m*).

(*e*) *Ex parte Moss, In re Toward* (1884), 14 Q. B. D. 310.

(*d*) *Ex parte Nichols, In re Jones* (1883), 22 Ch. D. 782. Cf. *In re Davis & Co., Ex parte Rawlings* (1888), 22 Q. B. D. 193.

(*e*) *In re Pyle Works* (1890), 44 Ch. D. 534; approved in *Newton v. Anglo-Australian Co.*, [1895] A. C. 244. See *In re Mayfair Property Co., Bartlett v. Mayfair Property Co.*, [1898] 2 Ch. 28; and pp. 624—626, *supra*.

(*g*) See *Arbuthnot v. Norton* (1846), 5 Moo. P. C. 219; *Stone v. Lidderdale* (1795), 2 Anst. 533; *Cooper v. Reilly*

(1829), 2 Sim. 560. Cf. *Grenfell v. Dean and Canons of Windsor* (1840), 2 Beav. 544.

(*h*) *In re Robinson* (1884), 27 Ch. D. 160, 164.

(*i*) See *Stevens v. Bagwell* (1808), 15 Ves. 139; *Simpson v. Lamb* (1857), 7 El. & B. 84; *Bradlaugh v. Newdegate* (1883), 11 Q. B. D. 1.

(*k*) *James v. Kerr* (1888), 40 Ch. D. 449. As to this case, cf. *Mainland v. Upjohn* (1889), 41 Ch. D. 126.

(*l*) See pp. 741—747, *supra*.

(*m*) *Church v. Sage* (1892), 41 W. R. 175; 67 L. T. 800. Cf. *London and York-*

Preliminary Inquiry.

Before relying upon a mortgage of a chose in action the banker should inquire of the debtor or trustee from whom the money is alleged to be due, not only as to the existence of the obligation, but also as to whether he has received any notice of a prior assignment or charge (*n*).

The banker will not, however, lose priority by failing to make this inquiry (*o*).

Where he makes it he cannot insist upon an answer (*p*). Nor is a trustee, upon receiving notice of an incumbrance, bound to disclose a prior incumbrance even when it is in favour of himself (*q*).

But if the debtor or trustee, as the case may be, gives an answer, it must be according to the best of his knowledge and belief (*r*). If wilfully inaccurate, he will be responsible for the consequences (*r*).

If the banker before making his advance gets notice of a prior incumbrance, he will take subject to it, and will not be able to get priority in any way (*s*).

Notice of the existence of debentures is not in itself notice of a prior charge over specific property of a company.

In *English and Scottish Mercantile Investment Co., Limited v. Brunton* (*t*) a limited company issued debentures charging all its property, both present and future, and containing a condition that the company should not be at liberty to create any mortgage or charge in priority to the debentures. Subsequently the company obtained a loan from the respondents on the security of an assignment to them of its interest in moneys due from an insurance company. When the loan and assignment were effected the respondents' solicitor, who negotiated the matter for them, knew

shire Bank v. White (1895), 11 T. L. R. 570.

(*n*) See pp. 838—840, *infra*.

(*o*) *Foster v. Blackstone* (1833), 1 M. & K. 297; affirmed *sub nom. Foster v. Cockerell*, 9 Bl. N. S. 332; 3 Cl. & F. 456; *Timson v. Ramsbottom* (1837), 2 K. 35, at p. 49; *Warburton v. Hill* (1854), Kay, 470, at p. 478; explained in *Haly v. Barry* (1868), 3 Ch. 452. See *Spencer v. Clarke* (1878), 9 Ch. D. 137.

(*p*) *Low v. Bouverie*, [1891] 3 Ch. 82; per Lord Herschell in *Ward v. Duncombe*, [1893] A. C. 369, at p. 383.

(*q*) *Ex parte Garrard, In re Lewer* (1877), 5 Ch. D. 61.

(*r*) *Browne v. Savage* (1859), 4 Drew. 635, at p. 639; *Low v. Bouverie*, see note (*p*), *supra*, at p. 100 of the report.

(*s*) *In re Holmes* (1885), 29 Ch. D. 786.

(*t*) [1892] 2 Q. B. 700.

that debentures had been issued, but did not know in what form they were issued, and having been misled by the managing director of the company into believing that there was nothing in the debentures to affect his client's security, he did not require to see the form. The respondents gave notice of the assignment to the insurance company, and subsequently the debenture-holders gave notice to the insurance company of the prior charge created by the debentures. There are three forms in which debentures are usually issued. In two of them the debenture does not, and in the third it does, restrict the company from creating any charge upon its property which shall have priority over the charge created by the debenture. It was held that the respondents were not affected with constructive notice of the restrictive clause in the debentures, and therefore that the assignment gave them a charge upon the insurance moneys in priority to the debenture-holders (*u*).

Formal Mortgage.

The appropriate method of mortgaging a chose in action is by deed of assignment.

"Where a debt is assigned as a security, it is always proper to insert a clause to the effect that it shall not be incumbent on the assignee to sue for the debt; for without it, if the assignee neglect to put in force the remedies for its recovery, and the money is lost by this neglect, the loss will fall on the mortgagee" (*x*).

Formerly, in the case of mortgages of debts, it was usual to insert a power of attorney enabling the mortgagee to sue for the debt in the name of the mortgagor. But where the whole debt is assigned as security, such a power is now unnecessary by reason of the Judicature Act, 1873 (*y*), which enacts as follows:—

25.—(6.) Any absolute assignment, by writing under the hand of the assignor (not purporting to be by way of charge only), of any debt or other legal chose in action, of which express notice in writing shall have been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall

(*u*) See pp. 726—728, *supra*.

(*x*) Bythewood & Jarman's Conveyancing, 4th ed. Vol. III. p. 818. Cf.

Davidson's Precedents in Conveyancing, Vol. II. Part 2, pp. 139-40.

(*y*) 36 & 37 Vict. c. 66.

be, and be deemed to have been, effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed), to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor: Provided always, that if the debtor, trustee, or other person liable in respect of such debt or chose in action shall have had notice that such assignment is disputed by the assignor or any one claiming under him, or of any other opposing or conflicting claims to such debt or chose in action, he shall be entitled, if he think fit, to call upon the several persons making claim thereto to interplead concerning the same, or he may, if he think fit, pay the same into the High Court of Justice under and in conformity with the provisions of the Acts for the relief of trustees (z).

The words "debt or other legal chose in action" mean debt or right which the common law looks on as not assignable by reason of its being a chose in action, but which a Court of Equity deals with as being assignable (a).

They therefore include the interest of a person under a contract whereby another has agreed to sell a reversionary interest in property (b).

The term "legal chose in action" includes all rights the assignment of which a Court of Law or Equity would before the Act have considered lawful (c).

(z) This sub-section is retrospective in effect: *Dibb v. Walker*, [1893] 2 Ch. 429.—Prior to the Act certain choses in action were assignable by custom or statute, e.g., negotiable instruments, life and marine policies, bills of lading, and railway mortgages and bonds.

(a) Per Channell, J., in *Torkington v. Magee*, [1902] 2 K. B. 427, at pp. 430-1. See next note.

(b) *Torkington v. Magee*, [1902] 2 K. B. 427; [1903] 1 K. B. 644. The decision of the Divisional Court in this case was reversed by the Court of Appeal on the ground that, on the facts, there had been no breach of contract, and it was accordingly unnecessary for them to deal with the point of law. See also *Harding*

v. Harding (1886), 17 Q. B. D. 442; *Walker v. Bradford Old Bank* (1884), 12 Q. B. D. 511, cited at p. 232, *supra*; and cf. the last note, *supra*.

(c) Per the judges of the Supreme Court of Queensland in *King v. Victoria Insurance Co.*, [1896] A. C. 250, at p. 254. The Judicial Committee, on the appeal in this case, stated that they did not dissent from this construction, but preferred to avoid discussing it. The definition was adopted by Farwell, J., in *Manchester Brewery Co. v. Combs*, [1901] 2 Ch. 608, at p. 619.—The term does not include a right to sue for damages in tort: *Dawson v. Great Northern and City Railway*, [1904] 1 K. B. 277.

A mortgage of a debt due to the mortgagor in the ordinary form, that is to say, where the entire interest of the mortgagor in the debt due or to become due is passed to the mortgagee subject to the right of redemption, is an absolute assignment within this section (*d*). If, on the construction of the document, it appears to be an absolute assignment, though subject to an equity of redemption, express or implied, it is immaterial whether the security is for a fixed and definite sum or for a current account. In either case the debtor can safely pay the assignee, and he is not concerned to inquire into the state of the accounts between the assignor and the assignee. Nor does it affect the position if the assignee has obtained a power of attorney from the assignor (*e*).

If, however, the whole debt is not assigned by the mortgage, but only a part of it sufficient for repayment of the sum advanced by the mortgagee, the case is not within the section (*f*).

Informal Mortgage.

Any words showing an intention on the part of the customer to charge a chose in action to which he is entitled in favour of the banker, as security for a loan, will constitute a valid assignment (*g*).

Where the assignment takes the form of a letter, it is irrevocable from the time when it is posted (*h*).

Even writing is not essential (*i*), except in cases coming within the Statute of Frauds (*k*).

Accordingly, an assignment may take the form either (1) of an agreement between the banker and customer that the debt owing to the former shall be paid out of a specific fund to which the latter is entitled; or (2) of an order given to the banker by the customer and addressed to the person indebted to him, or having,

(*d*) *Hughes v. Pump House Hotel Co.*, [1902] 2 K. B. 190.

(*e*) Per Cozens-Hardy, L. J., in the last cited case, at pp. 197, 198. Cf. *Durham Brothers v. Robertson*, [1898] 1 Q. B. 765.

(*f*) *Mercantile Bank v. Evans*, [1899] 2 Q. B. 613; *Jones v. Humphreys*, [1902] 1 K. B. 10.

(*g*) Per Lord Hardwicke in *Row v. Daw-*

son (1749), 1 Ves. sen. 331. Cf. *Brandts, Sons & Co. v. Dunlop Rubber Co.*, [1904] 1 K. B. 387; and per Romer, L. J., in *Continental Caoutchouc, & Co. v. Kleinwort, Sons & Co.* (1904), 20 T. L. R. 403.

(*h*) *Alexander v. Steinhardt, Walker & Co.*, [1903] 2 K. B. 208.

(*i*) *Field v. Megaw* (1869), 4 C. P. 660.

(*k*) For such a case, see *Ex parte Hall*, cited at p. 719, *supra*.

or about to have, in his hands a fund to which the customer is, or will be, entitled, and directing that person to pay to the banker a certain sum out of that debt or fund.

I. Assignment by Agreement.

Where an agreement between the banker and his customer is relied upon as the assignment, it is necessary and sufficient if words have been used which refer to a particular fund, and amount to an appropriation of the whole or a part of it, to the payment of the debt due to the banker (*l*).

In *In re Irving, Ex parte Brett (m)*, A., for good consideration, gave a bank a written undertaking to pay over to them all dividends that he should receive on his proof against a bankrupt's estate. A. became bankrupt, and the bank then gave notice of their claim to the trustees in the first bankruptcy. It was held that there had been a good equitable assignment of the dividends, and that the bank were entitled as against A.'s trustee in bankruptcy.

But the intention on the part of the customer to create a charge in favour of the banker must clearly appear. It will not be inferred from expressions which do not, according to their fair construction, necessarily imply it.

Thus, no charge will be created by a customer's mere statement that the arrival of a certain cargo will put him in funds (*n*); or by his promise to repay the advance of the banker when he himself receives payment of a particular debt (*o*).

II. Assignment by Order to Third Party.

Where the assignment takes the form of an order addressed by the customer to the person from whom he himself has a right to payment, it is necessary that it should specify the fund or debt out of which the payment to the banker is to be made (*p*).

It must also be a communication making it the duty of the

(*l*) *Rodick v. Gandell* (1852), 1 De G. M. & G. 763, at p. 776; *Percival v. Dunn* (1885), 29 Ch. D. 128; *Gorringe v. Irwell, &c. Works* (1886), 34 Ch. D. 128.

(*m*) (1877), 7 Ch. D. 419.

(*n*) *Malcolm v. Scott* (1849), 3 Mac. & G. 29; (1850), 5 Exch. 601; *Jones v. Starkey* (1852), 16 Jur. 510.

(*o*) *Field v. Megaw* (1869), 4 C. P. 660.

(*p*) *Percival v. Dunn* (1885), 29 Ch. D. 128.

person to whom it is addressed to comply with its terms (*q*), and not merely suggestive, leaving the matter to his discretion (*r*).

It is not necessary that the party to whom the order is addressed should agree to hold the fund for the banker (*s*).

In the leading case of *Row v. Dawson* (*t*), the draft was addressed by the debtor to the deputy of Horace Walpole, and was in the following terms: "Out of the money due to me from Horace Walpole out of the Exchequer, and what will be due at Michaelmas, pay to Tonson 400*l.* and to Cowdery 200*l.* value received." Lord Hardwicke held that this amounted to an assignment, and prevailed against the claim of the assignees in the bankruptcy of the debtor (*u*).

Neither a bill of exchange (*x*) nor a cheque (*y*), although for the precise amount standing to the credit of the customer with his banker, amounts to an assignment of that balance.

It is, indeed, important, where the assignment is in the form of an order, that it should not be open to objection as being in effect a bill of exchange and not properly stamped (*z*).

The distinction between a mere order for the payment of money and an order amounting to an assignment was explained in *Buck v. Robson* (*a*). There T. had contracted with J. to build for him a steam launch for the sum of 80*l.*, the price to be paid when the boat should be completed and delivered. T., after receiving 40*l.* on account, addressed a letter to J. as follows: "I hereby assign to Messrs. R. & Son the sum of 40*l.* now due, or that may hereafter become due, in respect of the steam launch which I am

(*q*) *Lett v. Morris* (1831), 4 Sim. 607; *Diplock v. Hammond* (1854), 2 Sm. & G. 141; 5 De G. M. & G. 320; 23 L. J. Ch. 550; *Brandts, Sons & Co. v. Dunlop Rubber Co.*, [1904] 1 K. B. 387.

(*r*) *Watson v. Duke of Wellington* (1830), 1 Russ. & M. 602.

(*s*) *Burn v. Carvalho* (1839), 4 Myl. & C. 690; *Bell v. L. & N. W. Rail. Co.* (1852), 15 Beav. 548.

(*t*) (1749), 1 Ves. sen. 331.

(*u*) For an illustration of a charge created by a notice given by a *cestui que trust* to his trustees to pay money to the credit of his account at a bank, see

Ex parte Steward (1843), 3 M. D. & D. G. 265.

(*x*) *Shand v. Du Buisson* (1874), 18 Eq. 283.

(*y*) *Hopkinson v. Forster* (1874), 19 Eq. 74. See pp. 249, 327, *supra*.

(*z*) See *Diplock v. Hammond* (1854), 2 Sm. & G. 141; 5 De G. M. & G. 320; 23 L. J. Ch. 550. *Ex parte Shellard, In re Adams* (1873), 17 Eq. 109, was not followed in *Buck v. Robson* (1878), 3 Q. B. D. 686, in view of the decision in *Brice v. Bannister* (1878), 3 Q. B. D. 569.

(*a*) (1878), 3 Q. B. D. 686.

building for you." It was held that this letter was an assignment and not an order for the payment of money. The question arose in connection with the want of a stamp, but the decision is of general application.

Lord Chief Justice Cockburn, delivering the judgment of the Court, consisting of himself and Mellor, J., referred to *Brice v. Bannister* (*b*), and, after pointing out that it was assumed that the instrument in question in that case amounted to an assignment, proceeded: "For had the direction to the defendant to pay to the plaintiff amounted to no more than what is technically termed an order for the payment of money, the liability of the drawee would have been, not to the payee but to the drawer, and the claim of the latter would have been liable to be met by any diminution of the fund drawn upon through payments made to or on account of the drawer subsequently to the date of the order. In our acceptance of the term, an order for the payment of money presupposes moneys of the drawer in the hands of the party to whom the order is addressed, held on the terms of applying such moneys as directed by the order of the party entitled to them. No such obligation arises out of the ordinary contract of sale. If a purchaser buys goods of a manufacturer or a tradesman, he undertakes to pay the price to the seller, not to a third party, who is a stranger to the contract, nor will the mere order or direction of the seller to pay to a third party impose any such obligation upon him; it is only when, and because, the right of the seller to the price has been transferred to the third party by an effectual assignment that the assignee becomes entitled as of right to the payment. The decision of the Court of Appeal in *Brice v. Bannister* in favour of the plaintiff on an order similar in its terms to those of the document in the case before us, implies that the Court looked upon the document, not as an order for the payment of money, but as an assignment *pro tanto* of the debt due from the defendant to the builder. Being ourselves decidedly of opinion that an order from a creditor to his debtor under an ordinary contract for the price of goods, or for work and labour, or the like, to pay to a third party can confer a right on the latter only so far as

(*b*) (1878), 3 Q. B. D. 569.

it operates as an assignment of the debt, we feel ourselves warranted, on the authority of *Brice v. Bannister*, in acting on that view, notwithstanding the decision in *Ex parte Shellard* (c), and in holding that the letter from Tate to Jopling was in effect an assignment, and not an order for the payment of money" (d).

Stamp.—If the document amounts to an assignment and is not stamped, it will nevertheless be admissible in evidence on payment of the proper stamp duty and the penalty.

"The result of the cases seems to be that an order or authority for payment, sent to the person to whom the payment is to be made, of a debt owing by a third person who is not under the obligation indicated in the judgment of Cockburn, C. J. (e), is an assignment liable to the duty of ten shillings as a 'conveyance not hereinbefore charged' (f), or *ad valorem* conveyance duty if on sale or in consideration *pro tanto* of any debt under sect. 57" (g) of the Stamp Act, 1891.

Action upon Assignment outside Judicature Act.—If the assignment, for want of notice or any other reason, does not come within the section cited above (h), nevertheless, being based upon the valuable consideration of the advance by the banker, it will be enforceable as an equitable assignment, the assignor and assignee both being before the Court (i). If the assignor refuses his co-operation, the Court has jurisdiction to order what is necessary (k).

In the case of the assignment of a legal chose in action which does not come within the section, the assignee should tender the assignor an indemnity and procure his concurrence as a party (l).

(c) (1873), 17 Eq. 109.

(d) This case was followed in *Fisher v. Calvert* (1879), 27 W. R. 301.

(e) In *Buck v. Robson*, quoted on the preceding page.

(f) See Schedule to the Stamp Act, 1891, "Conveyance or transfer of any kind not hereinbefore described."

(g) *Alpe's Stamp Duties*, 9th ed. p. 75.

(h) At p. 828, *supra*.

(i) See *Brice v. Bannister* (1878), 3 Q. B. D. 569; *Durham Brothers v. Robertson*, [1898] 1 Q. B. 765, at p. 773; *In re Griffin*, [1899] 1 Ch. 408; *Bence v.*

Shearman, [1898] 2 Ch. 582, at p. 588; *West v. Newing* (1900), 82 L. T. 260; *Marchant v. Morton, Down & Co.*, [1901] 2 K. B. 829; *Jones v. Humphreys*, [1902] 1 K. B. 10; *Palmer v. Culverwell* (1901), 85 L. T. 758; and notes to *Ryall v. Rowles* (1749), 1 Ves. sen. 348; W. & T. L. C. 7th ed. Vol. I. p. 102.

(k) *Hammond v. Messenger* (1838), 9 Sim. 327, at p. 332. See also *Keys v. Williams* (1838), 3 Y. & C. Ex. 55, 462; *Rose v. Clarke* (1842), 1 Y. & C. C. C. 534.

(l) *Turquand v. Fearon* (1879), 4 Q. B.

If by reason of the assent of the debtor to the assignment there has been a novation, he will, of course, be directly liable upon contract to the assignee (*m*).

An equitable assignee of a debt owing by a company can maintain a petition for a winding-up order (*n*).

Notice.

Reasons for Giving.—Notice to the debtor, trustee, or other holder of the fund assigned, of the fact of the assignment is not necessary to complete the title of the mortgagee as against the mortgagor or third parties who stand in the same position, for instance, persons whose claim is under a subsequent assignment made without consideration (*o*), or a judgment creditor who has obtained a charging (*p*) or garnishee order (*q*). The mortgage will be good as an equitable assignment without it (*r*).

But notice should always be promptly given by the banker for the following reasons.

I. Notice in writing is necessary, as we have seen, to entitle the banker to sue in his own name.

II. If, in the absence of notice, the debtor pays the mortgagor, he will be effectually discharged (*s*).

If the trustee, executor, or debtor disregards a notice, he will be liable for the consequences to the assignee who has given it (*t*).

D. 280. Cf. *Goodman v. Robinson* (1886), 18 Q. B. D. 332; *Sanders v. Peek* (1884), 32 W. R. 462; *Marchant v. Morton, Down & Co.*, [1901] 2 K. B. 829, at p. 832.

(*m*) See pp. 13—18, *supra*.

(*n*) *In re Montgomery Moore, &c. Syndicate* (1903), 72 L. J. Ch. 624; 19 T. L. R. 554; W. N. 121.

(*o*) *Justice v. Wynne* (1860), 12 Ir. Ch. R. 289.

(*p*) *Beavan v. Lord Oxford* (1855), 6 De G. M. & G. 492; *Eyre v. McDowell* (1861), 9 H. L. C. 619, at p. 642; *Scott v. Hastings* (1858), 4 K. & J. 633.

(*q*) *Pickering v. Ilfracombe Rail. Co.* (1868), 3 C. P. 235; *Crow v. Robinson* (1868), 3 C. P. 264; *Badeley v. Consolidated Bank* (1888), 38 Ch. D. 238.

(*r*) *Newman v. Newman* (1885), 28 Ch. D. 674.

(*s*) *Norrish v. Marshall* (1821), 5 Mad. 475; *Stocks v. Dobson* (1853), 4 De G. M. & G. 11; *Cothay v. Sydenham* (1788), 2 Bro. C. C. 391; *Leslie v. Baillie* (1843), 2 Y. & C. C. C. 91. But the assignor is bound to pay over what he has received to the assignee: *In re Patrick*, [1891] 1 Ch. 82.

(*t*) *Williams v. Thorp* (1828), 2 Sim. 257; *Roberts v. Lloyd* (1840), 2 Beav. 376; *Andrews v. Bousfield* (1847), 10 Beav. 511; *In re Hennessy* (1842), 2 Dr. & War. 555; *Stephens v. Venables* (No. 1) (1862), 30 Beav. 625; *Brice v. Bannister* (1878), 3 Q. B. D. 569. See also *Jones v. Farrell* (1857), 1 De G. & J. 208.

In *Yates v. Terry* (*u*) money in the hands of the defendant was attached under a garnishee order to satisfy a judgment debt. The judgment debtor assigned to the plaintiff the balance of the amount in the hands of the defendant, and notice was given of the assignment. Subsequently a garnishee order was served on the defendant with respect to another judgment debt. The defendant thereupon paid the amount of the first judgment debt into court, and the balance of the money in his hands he paid into court under the second garnishee order. It was held that, when the first garnishee order had been satisfied by payment into court, the assignment took effect as to the balance in the hands of the defendant; that that money should have been paid to the plaintiff, and that he was accordingly entitled to recover its amount from the defendant.

But notice to a debtor, who has given a negotiable instrument in payment of his debt, that the debt has been assigned by the creditor, may be disregarded by the debtor, even if the creditor who has assigned the debt is still the holder of the negotiable instrument (*x*).

So a notice to the vendor of an estate that the vendee has deposited the contract with a third party, A., and has entered into an agreement with A. to make to A. "a valid assignment" of the contract, does not bind the vendor to make inquiries whether the agreement between the vendee and A. has been carried into effect; nor will it compel the vendor to refuse to execute the conveyance to the vendee, who, upon the payment of the purchase-money, demands the conveyance, nor even excuse the vendor for making such a refusal. The person who claims to have the benefit of the assignment must give distinct notice to the vendor of his claim, and of his readiness to put himself in the vendee's position for the completion of the contract.

In *Shaw v. Foster* (*y*) F. entered into a contract with P. to sell him some leasehold property. P. paid part of the purchase-money, and obtained from F. a lease of the premises for a short term of years, in favour of a nominee of P. P. had dealings with bankers,

(*u*) [1902] 1 K. B. 527. Cf. *Rogers v. Whiteley*, cited at p. 301, *supra*.

(*x*) *Bence v. Shearman*, [1898] 2 Ch. 582, at p. 586.

(*y*) (1872), 5 E. & I. A. 321.

to whom he became much indebted. Being called on to give the bankers some security, he handed to them the title-deeds of a freehold estate, which he charged with the debt, and at the same time he deposited with them his contract for the purchase of the leasehold property. He accompanied this deposit with a written memorandum, in which he agreed to make to the bankers "a valid assignment of my contract with F. for the purchase of" the leasehold premises, "by way of mortgage for farther securing," &c. The bankers, by their solicitor, some time afterwards gave to F. notice (in the above words) of this agreement, and the solicitor's letter called it "a charge by P. on his purchase." F. acknowledged the receipt of this notice. He heard nothing more of the matter. P. did not complete his purchase at the stipulated time, but did so afterwards, and then F., according to the terms of the original contract, executed to him a conveyance of the leasehold premises, without any notice being taken in the conveyance of the claims of the bankers. It was held that the rule of Equity that a vendor of an estate is, after the making of the contract of sale, a trustee for the purchaser, did not apply to this case, and that F. was in no way liable to the bankers.

In *Western Wagon and Property Company v. West* (z) P. mortgaged freehold property to the defendants to secure 7,500*l.* and further advances up to 10,000*l.*, which the defendants contracted to make. P. made a second mortgage of the same property to the plaintiffs to secure 1,000*l.* and further advances up to 2,500*l.*, and assigned to them his right, under the contract in the first mortgage, to call for and require payment from the defendants of the further advances therein mentioned, and the full benefit of the contract. The plaintiffs gave notice of this assignment to the defendants, but, notwithstanding the notice, the defendants subsequently made a further advance of 500*l.* to P. The plaintiffs brought an action to recover from the defendants personally the sum of 500*l.* so paid by them to P., or damages for breach of contract. It was held that no money or fund was bound by the contract to make further advances, which created no debt, and that the plaintiffs could not sue for damages in their own right, but only in the right of their

(z) [1892] 1 Ch. 271.

assignor, P., who, on the facts, had sustained no damage, and that on this point also the plaintiffs' claim failed.

III. Priority, as between several incumbrancers or assignees, is determined by the date of notice to the debtor or trustee, if their equities are otherwise equal (*a*).

Accordingly, if the banker omits to give notice, and the mortgagor subsequently makes another assignment of the same debt or fund to one who has no notice of the earlier mortgage, and the latter gives notice, he will have priority over the banker. If the later assignment is absolute and not by way of mortgage, or if it is to secure an amount which exhausts the debt or fund mortgaged, the banker will thus be entirely ousted.

The subsequent incumbrancer will, indeed, gain this priority by giving the first notice, although he, in fact, made no inquiry as to the existence of incumbrances at the time of making his own advance (*b*).

But if at the time of making his advance the banker or other incumbrancer had notice of a former assignment, he cannot, by giving notice himself, gain priority (*c*).

In *Marchant v. Morton, Down & Co.* (*d*) a debt due to a firm was assigned by one partner to the defendants by writing, and was subsequently assigned by the other partner to the plaintiff by deed. The plaintiff gave notice to the debtor before the defendants did so. It was held that there was a valid equitable assignment of the debt to the plaintiff, and that, having first given notice to the debtor, he was entitled to the debt in priority to the defendants.

In *In re Beall, Ex parte The Official Receiver* (*e*), an undischarged bankrupt assigned for value the amount of his taxed bill of costs as solicitor for the petitioning creditors of a company in liquidation. His trustee in bankruptcy gave notice, before the assignee, to the

(*a*) *Dearle v. Hall* (1828), 3 Russ. 1; *Brice v. Bannister* (1878), 3 Q. B. D. 569; *Johnstone v. Cox* (1880), 16 Ch. D. 571; 19 Ch. D. 17.

(*b*) *Foster v. Blackstone* (1833), 1 My. & K. 297; *sub nom. Foster v. Cockerell* (1835), 9 Bligh, N. S. 332; 3 Cl. & F. 456; *Timson v. Ramsbottom* (1837), 2 Keen, 35, at p. 49; *Etty v. Bridges*

(1843), 2 Y. & C. C. C. 486, at p. 494 (distinguished in *In re Wasdale, Brittin v. Partridge*, [1899] 1 Ch. 163); *Warburton v. Hill* (1854), Kay, 470; *Stocks v. Dobson* (1853), 4 De G. M. & G. 11.

(*c*) *Spencer v. Clarke*, cited at p. 824, *supra*.

(*d*) [1901] 2 K. B. 829.

(*e*) [1899] 1 Q. B. 688.

liquidator of the company claiming the amount of the taxed bill as part of the after-acquired property of the bankrupt. It was held that the trustee was entitled to the amount in priority to the assignee.

But a trustee in bankruptcy, being under the bankruptcy laws only statutory assignee of the bankrupt's choses in action, subject to all equities existing therein at the date of the commencement of the bankruptcy, cannot obtain priority over a good equitable mortgage thereof for value merely by giving notice before the mortgagee (*f*).

The doctrine of *lis pendens* does not apply to personal property other than chattel interests in land.

In *Wigram v. Buckley* (*g*) a firm of traders assigned their book debts to the plaintiffs, who gave no notice of the assignment to the debtors. The plaintiffs brought an action against the firm to enforce their security, which they registered as a *lis pendens*, and obtained an injunction and a receiver; but no notice of the action was given to the debtors. The firm then assigned the same book debts to a banking company, who gave notice of their security to the debtors. The banking company had no notice of the action or of the order for an injunction and a receiver, unless the registration of the *lis pendens* amounted to constructive notice. It was held that the banking company were not affected with notice by the registration of the *lis pendens*, and that their security had priority over that of the plaintiffs. The Court was also of opinion that, even if the registration had given the banking company notice of the *lis pendens*, the plaintiffs would have lost their priority by their laches.

Where notices of assignment are given simultaneously by two assignees, the assignments will take priority according to the dates when they were made.

In *Calisher v. Forbes* (*h*) an officer in the army had retired from the service by the sale of his commission. The proceeds of the sale were in the hands of the army agents on the 7th of December, but the balance payable to him, after deduction of his regimental debts, was not transferable to his account until the 8th, on which

(*f*) *In re Wallis, Ex parte Jenks*, [1902] 1 K. B. 719.

(*g*) [1894] 3 Ch. 483.

(*h*) (1871), 41 L. J. Ch. 56.

day it was so transferred. He had previously to the sale charged the proceeds of his commission with various sums of money advanced to him. One of the incumbrancers left a notice of his charge at the office of the army agents at half-past five p.m. on the 7th, after business hours and when the office was closed. The other incumbrancers left similar notices as soon as the office doors were open next morning. It was held that a notice left at a bank after business hours only operates as notice to the bank from the time when, in the ordinary course of business, it is opened and read; and that, accordingly, all the notices must be taken to have been left at the same time, and, therefore, that the priorities of the several incumbrancers depended on the dates of their securities (*i*).

IV. If the chose in action which is the subject of the mortgage is a debt due or growing due to the mortgagor in the course of his trade or business, notice is necessary in order to prevent the debt, in case of bankruptcy, coming within the reputed ownership clause of the Bankruptcy Act, 1883 (*k*).

By sect. 44 (iii.) of that Act the property of the bankrupt divisible amongst his creditors generally comprises (amongst other things) "all goods being at the commencement of the bankruptcy in the possession, order, or disposition of the bankrupt, in his trade or business, by the consent and permission of the true owner under such circumstances that he is the reputed owner thereof: provided that things in action other than debts due or growing due to the bankrupt in the course of his trade or business shall not be deemed goods within the meaning of this section."

Debts due, or growing due, to the mortgagor in the course of his trade or business and connected therewith (*l*), although they are not presently payable, are within this clause, provided that they are not contingent at the commencement of the bankruptcy (*m*).

(*i*) See also *Johnstone v. Cox* (1880), 16 Ch. D. 571; 19 Ch. D. 17.

(*k*) 46 & 47 Vict. c. 52.—As to the difference between the sufficiency of notice for this purpose and for that of giving priority as between successive incumbrancers, see the judgment of Cozens-Hardy, J., in *Lloyd's Bank v.*

Pearson, [1901] 1 Ch. 865, at p. 872.

(*l*) *In re Pryce, Ex parte Rensburg* (1877), 4 Ch. D. 685. See also *In re Jenkinson, Ex parte Nottingham Bank* (1885), 15 Q. B. D. 441.

(*m*) *Ex parte Kemp, In re Fastnedge* (1874), 9 Ch. 383; *In re Stockton Malleable Iron Co.* (1875), 2 Ch. D. 101.

Notice of an assignment prevents the application of this clause (*n*).

Notice to the party from whom the mortgagor is to receive payment, although that person be not the original debtor (*o*), if given at any time before the bankruptcy will suffice to protect the assignee of the debt (*p*).

Although, in default of notice, the trustee in bankruptcy will be entitled to recover the debt, apparently he will not be able to recover any documents relating to it which have been deposited as security (*q*).

The rules of bankruptcy as to reputed ownership do not apply in the winding-up of companies (*r*).

Requisites of a Valid Notice.—The notice should be in writing.

In order to bring the case within the sub-section of the Judicature Act which is cited above (*s*), this is necessary.

But, except for the purpose indicated, parol notice is sufficient, provided the fact of the assignment is distinctly and clearly brought to the mind and attention of the person receiving it (*t*). But a statement made in the course of merely casual conversation is not sufficient (*u*).

A general notice of a charge, without specifying the amount, though not what is desirable, may be sufficient. Where, however, two charges on a chose in action were comprised in one deed, and a notice was given to the trustees which specified one only, they

(*n*) *Ryall v. Rowles* (1749), 1 Ves. sen. 348; *Ex parte Snither* (1836), 3 M. & A. 693; 1 Deac. 413; *Douglas v. Russell* (1831), 4 Sim. 524; *Boyd v. Mangles* (1849), 3 Exch. 387; *Belcher v. Campbell* (1845), 8 Q. B. 1.

(*o*) *Garner v. Lachlan* (1838), 4 My. & Cr. 129; *Buck v. Lee* (1834), 3 Nev. & M. 580; *Ex parte M^cTurk* (1836), 2 Deac. 58.

(*p*) See sect. 49 of the Act; *In re Styan* (1842), 1 Ph. 105; 2 M. D. & D. G. 219. See *Ex parte Heslop*, *In re Atkinson* (1852), 1 De G. M. & G. 477; *In re Seaman*, [1896] 1 Q. B. 412.

(*q*) *Broadbent v. Varley* (1862), 12 C. B. N. S. 214; *Gibson v. Overbury* (1841), 7 M. & W. 555; *Green v. Ingham* (1867),

L. R. 2 C. P. 525. As to the last two cases, it must be borne in mind that the law as to the reputed ownership of choses in action has been altered by the Bankruptcy Act, 1883, s. 44 (iii.).

(*r*) *Gorringe v. Irwell, &c. Works* (1886), 34 Ch. D. 128.

(*s*) At p. 828.

(*t*) *In re Tichener* (1865), 35 Beav. 317; *Browne v. Savage* (1859), 4 Drew. 635, at p. 640; *North British Insurance Co. v. Hallett* (1861), 7 Jur. N. S. 1263; *Ex parte Agra Bank, In re Worcester* (1868), 3 Ch. 555; *Alletson v. Chichester* (1875), 10 C. P. 319.

(*u*) *In re Brown's Trusts* (1867), 5 Eq. 88; *Saffron Walden, &c. Building Society v. Rayner* (1880), 14 Ch. D. 406, at p. 411.

were held not to have constructive notice of the contents of the deed, so that notice of both charges could be imputed to them (*x*).

A mere mistake in the description of the fund mortgaged, if it is not such as to leave any doubt as to what is intended, will not render the notice void as against a subsequent assignee (*y*). But the notice, if it mentions a sum as being the amount secured, will be ineffective beyond that sum as against such an assignee (*z*).

Notice should be given by the mortgagee or his agent. But, if it is received *aliunde* and is such as a reasonable man in the ordinary course of business would act upon, it will be sufficient (*a*).

“The law is quite clear on the subject. It is to be found in Lord Cairns’ judgment in *Lloyd v. Banks* (*a*). There must be clear and distinct notice from the incumbrancer—in this case the equitable assignee—and the mind of the trustee must be brought in some way ‘to an intelligent apprehension of the nature of the incumbrance which has come upon the property, so that a reasonable man, or an ordinary man of business, would act upon the information and would regulate his conduct by it’ accordingly” (*b*).

Notice should be given to all the co-debtors or co-trustees, or, at all events, to the solicitor or other person who is acting as their agent in the matter (*c*). In case of a debtor’s death notice should be given to his executor or administrator (*d*).

A notice to a person who afterwards becomes trustee is insufficient (*e*).

An incumbrancer who first gives notice to any of the trustees obtains priority over any prior incumbrancer who has given no notice to any of them; but notice to one does not affect the other

(*x*) *In re Bright’s Trusts* (1856), 21 Beav. 430.

(*y*) *Whittingstall v. King*, W. N. (1882) 83; 46 L. T. 520.

(*z*) *Woodburn v. Grant* (1856), 22 Beav. 483.

(*a*) *Lloyd v. Banks* (1868), 3 Ch. 488.

(*b*) Per Chitty, L. J., in *Bence v. Shearman*, [1898] 2 Ch. 582, at p. 587.

(*c*) *In re Hennessy* (1842), 2 Dr. & War. 555; *Rickards v. Gledstones* (1862), 31 L. J. Ch. 142; *Willes v. Greenhill* (1861), 4 De G. F. & J. 147; *Brittain*

v. Brown (1871), 24 L. T. 504; *Saffron Walden, &c. Building Society v. Rayner* (1880), 14 Ch. D. 406. Cf. the judgment of Cozens-Hardy, J., in *Lloyd’s Bank v. Pearson*, [1901] 1 Ch. 865, at p. 872.

(*d*) *Thompson v. Tomkins* (1862), 2 Dr. & Sm. 8.

(*e*) *Somerset v. Cox* (1865), 33 Beav. 634; *Johnstone v. Cox* (1880), 16 Ch. D. 571; 19 Ch. D. 17. See also *Roxburghe v. Cox* (1881), 17 Ch. D. 520; *Addison v. Cox* (1872), 8 Ch. 76.

trustees so as to make them liable for what they may do in ignorance of the notice to their co-trustee (*f*).

If notice has been given to one trustee only priority is secured provided he remains in office at the time of the second assignment (*g*), except when he is himself the assignor (*h*).

An assignee who has given notice to one only of several trustees is not entitled to priority over a subsequent assignee who takes his assignment after the death of the trustee to whom notice was given (*i*).

But an assignee of a reversionary interest in a trust fund who has given notice to all the trustees in existence at the time of his assignment is under no obligation to give any further notice, and is consequently entitled to priority over a subsequent assignee who has taken his assignment after the death or retirement of all those trustees, and who gives notice of such assignment to the new trustees (*k*).

Where there has been first a settlement and then a second derivative settlement of the interest of a *cestui que trust* under the first settlement, and then the *cestui que trust* under the second settlement makes an assignment, the notice should be given to the immediate trustees of the *cestui que trust*.

In *Stephens v. Green*, *Green v. Knight* (*l*), a son was entitled under the will of his father to a contingent interest in a fund paid into court in an action to administer the father's estate. The son died while the interest was still contingent, having bequeathed a share of such interest to his daughter, who assigned such share successively to A. and B. B., who had no notice of A.'s assignment, obtained a stop order on the fund in court. A. gave notice of his assignment to the son's legal personal representative. Upon the interest falling into possession, it was held that, for the purpose

(*f*) Per Lindley, L. J., in *Low v. Bouverie*, [1891] 3 Ch. 82, at p. 104, cited by Stirling, J., in *In re Wyatt, White to Ellis*, [1892] 1 Ch. 188, at p. 199; reported on appeal to the House of Lords *sub nom. Ward v. Duncombe*, see next note.

(*g*) *Ward v. Duncombe*, [1893] A. C. 369.

(*h*) *Lloyd's Bank v. Pearson*, [1901] 1

Ch. 865; *Browne v. Savage* (1859), 4 Drew. 635.

(*i*) *Timson v. Ramsbottom* (1837), 2 Keen, 35; *In re Hall* (1880), 7 L. R. Ir. 180; *In re Phillips' Trusts*, [1903] 1 Ch. 183.

(*k*) *In re Wasdale, Brittin v. Partridge*, [1899] 1 Ch. 163.

(*l*) [1895] 2 Ch. 148.

of determining the priority between A. and B., the stop order had the same effect as notice to the father's executors would have had if the fund had not been in court; that the proper person to receive notice of the assignments was the trustee of the assignor, namely, the legal personal representative of the son; and that, consequently, A. had priority over B.

In the case of a mortgage of freight and earnings of a ship under a charter-party notice should, as a general rule, be given to the charterers or their agent (*m*).

In the case of an assignment of a debt owing from a company which is being wound up, notice must be given to the liquidator (*n*).

Equities.

The assignee, whether he be a mortgagee or a purchaser, of a chose in action, unlike a holder in due course of a negotiable instrument, takes it subject to all equities affecting it. Whether the subject-matter of the assignment is a debt or a fund, the assignee takes it subject to any defences which the debtor or holder, as the case may be, has against the assignor himself (*o*).

Thus, if money to arise under a contract is assigned, the assignee will only be entitled thereto subject to the conditions of the contract (*p*); or if a bond which is void against the assignor, or has been satisfied, is assigned, it will not be rendered valid (*q*).

(*m*) *In re "Pride of Wales"* (1867), 15 W. R. 381; *Gardner v. Lachlan* (1838), 4 My. & Cr. 129. Cf. *Countess Essarts v. Whinney* (1903), 19 T. L. R. 235.

(*n*) *In re Breech-Loading Armoury Co., Wragge's Case* (1868), 5 Eq. 284. See *Companies (Winding-up) Rules*, 1903, r. 119.

(*o*) *Ryall v. Rowles* (1749), 1 Ves. sen. 348; *Young v. Kitchen* (1878), 3 Ex. D. 127, approved in *Government of Newfoundland v. Newfoundland Rail. Co.* (1888), 13 A. C. 199; *Roxburghe v. Cox* (1881), 17 Ch. D. 520; *In re Moss Bay Hematite, &c. Co.* (1892), 8 T. L. R. 475; *Christie v. Taunton & Co.*, [1893] 2 Ch. 175; *Biggerstaff v. Rowatt's Wharf*, [1896] 2

Ch. 93, at p. 101; *In re Jones, Christmas v. Jones*, [1897] 2 Ch. 190, at pp. 203, 204. See also, as to a fund in court carried to a separate account, *Edgar v. Plomley*, [1900] A. C. 431; as to a stop order, *Montefiore v. Guedalla*, [1903] 2 Ch. 26; and as to the effect of a receivership order, *In re Marquis of Anglesey, Countess de Galve v. Gardner*, [1903] 2 Ch. 727.

(*p*) *Tooth v. Hallett* (1869), 4 Ch. 242 (distinguished in *Ex parte Moss, In re Toward* (1884), 14 Q. B. D. 310; *Drew & Co. v. Josolyne* (1887), 18 Q. B. D. 590).

(*q*) *Turton v. Benson* (1718), 1 P. Wms. 496.

So where there has been a partial satisfaction of the debt assigned, the assignee, although without notice, will take subject to the state of accounts between the debtor and the assignor at the date when the latter receives notice of the assignment (*r*).

So the assignee takes subject to any right of set-off available against the assignor before the debtor receives notice of the assignment (*s*).

In *National Bank of Scotland v. Dewhurst and others* (*t*) a line of steamers the property of different sets of co-owners was managed by T. & Co. T. & Co. assigned to the plaintiffs moneys alleged to be due to them from the owners of two of the steamers, and in consideration of the assignment the plaintiffs cashed cheques drawn by T. & Co. At the date of the assignment nothing was in fact owing from the owners to T. & Co., and the cheques were dishonoured. In an action against the owners it was held that the owners were entitled to set off sums owing to them from T. & Co. at the date of the assignment in respect of other steamers of the line.

But after the assignee has given notice of the assignment to the trustee or debtor, the latter cannot, as against the assignee, create any new right of set-off, or any new charge (*u*); unless it arises out of the same contract or transaction as that on which he is sued (*x*).

Mortgagee's Rights.

The title of the mortgagee to the debt or fund is limited to the amount due on his security.

In *In re Bell, Jeffery v. Sayles* (*y*), W., being entitled in reversion to one-eighth of a sum of 8,000*l.* bequeathed to trustees,

(*r*) *Ord v. White* (1840), 3 Beav. 357; *Norrish v. Marshall* (1821), 5 Mad. 475; *Stocks v. Dobson* (1853), 4 De G. M. & G. 11; *Bergmann v. Macmillan* (1881), 17 Ch. D. 423.

(*s*) *Cavendish v. Geaves* (1857), 24 Beav. 163.

(*t*) (1896), 1 Com. Cas. 318.

(*u*) *Cavendish v. Geaves*, see note (*s*), *supra*; *Stephens v. Venables* (No. 1) (1862), 30 Beav. 625; per James, L. J.,

in *Roxburghe v. Cox* (1881), 17 Ch. D. 520, at p. 526; *Bolton v. Curre*, W. N. (1894) 122.

(*x*) *Government of Newfoundland v. Newfoundland Rail. Co.* (1888), 13 A. C. 199; *Bergmann v. Macmillan* (1881), 17 Ch. D. 423; *Watson v. Mid Wales Rail. Co.* (1867), 2 C. P. 593; *Christie v. Taunton, Delmard, Lane & Co.*, [1893] 2 Ch. 175.

(*y*) [1896] 1 Ch. 1.

assigned it by way of mortgage to G., with power to give receipts in the name of W. or otherwise, with a proviso for redemption. On the death of the tenant for life of the fund, J., to whom the mortgage had been transferred, claimed to receive from the trustees 1,000*l.*, the whole amount of the share, the sum due on the mortgage being only about 400*l.* The trustees of the will, who had received notice of subsequent incumbrances, expressed themselves willing to pay to J. what was due on his mortgage, but declined to pay over to him the whole share. J. took out an originating summons to compel payment. It was held that the trustees were not bound to pay over the whole share to J., and that the summons must be dismissed.

Notice of Default.

In the event of non-payment of the debt mortgaged to the banker, there is no absolute obligation upon him to give notice to the customer, as in the case of the dishonour of a bill of exchange (*z*). It would seem, however, that, if loss should result from his omission to give notice, he might be held accountable as for wilful default (*a*), in the absence of an express provision in the mortgage instrument exonerating him from such liability (*b*).

(*z*) *Glyn v. Hood* (1859), 1 De G. F. & J. 334.

(*a*) Per Turner, L. J., at p. 349 of the report of the last cited case.

(*b*) Cf. p. 828, *supra*.

APPENDIX I.

UNREGISTERED BANKING COMPANIES.

A.—UNINCORPORATED COMPANIES.

COMPANIES consisting of more than six members, formed before the 6th May, 1844, and not subsequently registered, nor otherwise incorporated, but empowered to sue and be sued by public officers, constituted an important class of banks until long after that date (*a*). During the latter half of the last century, however, they steadily diminished in number, partly by extinction and partly by registration and other means of incorporation.

The general nature of these companies was explained by Mr. Justice Quain, delivering the judgment of the Court of Queen's Bench in *Swift v. Winterbotham* (*b*), as follows: "The company is not a corporation, and has, therefore, no common seal. It is a co-partnership created by deed or articles of co-partnership for a particular purpose, with certain statutable privileges. It can sue and be sued only in the name of one of its public officers, and in all litigious business the company is represented by one of its public officers who must be a member of the company; and individual members cannot be sued in respect of transactions with the company till a judgment or decree has been first obtained against the company through one of its public officers. In *Powles v. Page* (*c*), a company established under this Act" (7 Geo. 4, c. 46) "was considered a quasi-corporate body so as not to be affected by what may have been known to any individual member. The Act

(*a*) See 39 & 40 Geo. 3, c. 28, s. 15; 7 Geo. 4, c. 46; 3 & 4 Will. 4, c. 98; 1 & 2 Vict. c. 96; 3 & 4 Vict. c. 111; 7 & 8 Vict. c. 113, s. 47; 25 & 26 Vict. c. 89, s. 205, Third Schedule, Second Part; 27 & 28 Vict. c. 32.—Cf. also

Lindley on Companies, 6th ed. pp. 1342—1344, note (*d*).

(*b*) (1873), L. R. 8 Q. B. 244, at p. 250; reversed, 9 Q. B. 301; but the observations above cited are not affected by the reversal of the judgment.

(*c*) (1846), 3 C. B. 16.

contains no provision as to the manner in which the company shall make or sign deeds, contracts, or documents of any description. It confers no authority on the public officer to bind the company, but makes him the representative of the bank only for litigious purposes; and although he must be a member of the company, he may have nothing to do with the management of its affairs. It seems obvious, therefore, from the nature of its constitution as a fluctuating and numerous body, that the company cannot affix its signature to documents otherwise than by the hand of some individual or individuals who, by the articles of co-partnership, are appointed to represent the general body in such matters" (*d*).

In *Powles v. Page* (*e*), which is referred to in the above-cited judgment, A., B., C. and D., who carried on business under the firm of G. P. & Co., in 1840 opened an account with a banking company established under the 7 Geo. 4, c. 46; 1 & 2 Vict. c. 96; and 5 & 6 Vict. c. 85. In 1842 A. retired from the firm, but this fact was not advertised in the *London Gazette*, nor was any alteration made in the pass-book. It was held that the mere fact of D., one of the firm of G. P. & Co., being also a director of the banking company (but having as such no share in the management of or interference in the banking accounts) did not amount to notice—actual or constructive—to the bank of the dissolution so as to discharge A. in respect of a debt subsequently accruing: a banking company so established differing in this respect from an ordinary trading partnership.

In delivering the judgment of the Court of Common Pleas, Tindal, C. J., said: "We are of opinion that a joint stock banking company, established under the provisions of the 7 Geo. 4, c. 46, and 1 & 2 Vict. c. 96, and suing in the name of a public officer, is not to be considered as an ordinary co-partnership, but a quasi-corporate body, and that such joint stock company is not affected by that which may be known to any individual shareholder. The public officer represents a fluctuating body, and sues for the existing body of shareholders, who may be different persons from those who were so at the time when the cause of action accrued. . . . It was pressed upon us . . . that, even assuming that to be the law in general, yet, as Dixon was a member of the board of directors, the company must be affected by that which was known to him; but as the case states that he had not, as a director, any management of, or interference in, the banking accounts, we think that the circumstance of his being a director makes no difference in this respect" (*f*).

(*d*) See also *Macintyre v. Connell* (1851),
1 Sim. N. S. 225; 252; 20 L. J. Ch.
284; 15 Jur. 529.

(*e*) (1846), 3 C. B. 16.

(*f*) Approved in *In re Carew's Estate*
Act (No. 2) (1862), 31 Beav. 39.—The

No new company of this kind can be formed.

Returns.

Before a company of this kind could begin to issue any bills or notes, or to borrow, owe, or take up any money on their bills or notes, it was necessary for them to send to the Stamp Office an account or return setting forth (*inter alia*) the names and residences of the members, and the names and places of abode of two or more persons being members of the company and resident in England who had been appointed public officers of the company, together with the title of office or other description of every such public officer respectively (*g*).

A like return, made out and verified by the oath of one of the registered public officers (*h*), had to be sent in annually between the 28th February and the 25th March (*i*).

A mere irregularity in a return would not deprive a company of the privileges provided for by the Act (*j*).

Such companies were also bound to make the annual return specified on p. 5, *supra* (*k*).

Members.

Membership was dependent upon compliance with all the conditions necessary to constitute a person a member according to the company's deed of settlement (*l*).

The returns referred to above were evidence that all persons named therein as members were members at the dates of the returns in which their names appeared (*m*).

"A person returned as a member will," it is stated in Lindley on Companies (*n*), "until the contrary is shown, be presumed to have

nature of these companies was also expounded by Lord Cranworth in *Oakes v. Turquand* (1867), 2 E. & I. A. 325, at pp. 358-9.

(*g*) 7 Geo. 4, c. 46, s. 4, and Schedule A.

(*h*) But a certified copy of a return made out by a person calling himself "cashier" was held admissible in evidence: *Harvey v. Scott* (1847), 11 Q. B. 92; *Field v. Mackenzie* (1847), 4 C. B. 705, 717. Cf. *Steward v. Dunn* (1844), 12 M. & W. 655; *Bosanquet v. Woodford* (1843), 5 Q. B. 310.

(*i*) 7 Geo. 4, c. 46, s. 5. See *Prescott v. Buffery* (1845), 1 C. B. 41; and cf. *Bosanquet v. Woodford*, see last note.

(*j*) *Bonar v. Mitchell* (1850), 5 Ex. 415.

(*k*) 7 & 8 Vict. c. 32, s. 21; 12 & 13 Vict. c. 1; 25 & 26 Vict. c. 89, Third Schedule, Second Part.—After the 43 & 44 Vict. c. 20, s. 57, came into operation, it ceased to be obligatory upon the Commissioners of Inland Revenue to publish such return in any newspaper.

(*l*) *Ness v. Angas* (1849), 3 Ex. 805; 6 D. & L. 645; 18 L. J. Ex. 470; 13 Jur. 874. See also *Ness v. Armstrong* (1849), 4 Ex. 21; 7 D. & L. 73; 18 L. J. Ex. 473; 13 Jur. 874; *Bosanquet v. Shortridge* (1850), 4 Ex. 699; *Dodgson v. Bell* (1850), 5 Ex. 967. Cf. *Bargate v. Shortridge* (1855), 5 H. L. C. 297.

(*m*) 7 Geo. 4, c. 46, ss. 4-6.

(*n*) 6th ed. pp. 149-50.

been a member at the time the return was made and subsequently (*o*); and if two successive returns contain the name of the same person, the presumption is strong that he was a member during the whole period between the times at which such returns were made (*p*). There is nothing in the Act which makes the returns conclusive, either one way or the other; and a person not returned as a member may be proved, not only to have become a member since the making of the last return, but to have been a member at the time of the making of that return" (*q*).

No claim which any member might have in respect of his share could be set off against any demand which the company might have against him on account of any other matter or thing whatsoever (*r*).

Although the liability of a member was unlimited (*s*), a creditor of the company could not proceed against him by action (*t*). His remedy was to obtain judgment against the company sued by its public officer, and then to proceed upon that judgment as stated below; or, at his option, to take proceedings to have the company wound up (*u*).

Actions.

Public Officer.—All actions by or against the company had to be brought by or against a public officer of the company (*v*).

One public officer only could properly sue or be sued (*w*).

The appointment of a public officer might be compelled by prerogative writ of mandamus (*x*).

(*o*) *Steward v. Dunn* (1844), 12 M. & W. 655; *Ex parte Prescott* (1839), Mont. & Ch. 611; *Harvey v. Scott* (1847), 11 Q. B. 92; 17 L. J. Q. B. 9; 12 Jur. 12.

(*p*) *Bosanquet v. Shortridge* (1850), 4 Ex. 699.

(*q*) See *Prescott v. Buffery* (1845), 1 C. B. 41; *Bank of England v. Johnson* (1849), 3 Ex. 598.—See also *Powis v. Butler* (1858), 27 L. J. C. P. 249; 4 C. B. N. S. 469; 4 Jur. N. S. 614; and under the name of *Fry v. Russell*, 27 L. J. C. P. 153; 3 C. B. N. S. 665; 4 Jur. N. S. 193; *Clowes v. Brettell* (1843), 11 M. & W. 461; *Thompson v. Harding* (1857), 1 C. B. N. S. 555.

(*r*) 1 & 2 Vict. c. 96, s. 4. See *In re Caldecott* (1841), 2 M. D. & D. 368.

(*s*) 7 Geo. 4, c. 46, ss. 11—13.

(*t*) See *Fell v. Burchett* (1857), 7 E. &

B. 537; 26 L. J. Q. B. 223; 3 Jur. N. S. 388.

(*u*) As to this, see p. 855, *infra*.

(*v*) 7 Geo. 4, c. 46, ss. 4, 9, 14; 7 & 8 Vict. c. 113, s. 47. See *Pendlebury v. Walker* (1841), 4 Y. & C. Ex. 424; *Meux v. Maltby* (1818), 2 Swanst. 277; *Williams v. Beaumont* (1833), 10 Bing. 260; *Steward v. Greaves* (1842), 10 M. & W. 711; *Chapman v. Milvain* (1850), 5 Ex. 61. Cf. *Robertson v. Sheward* (1840), 1 M. & G. 511; *Law v. Parnell* (1859), 7 C. B. N. S. 282; *M'Dowell v. Deyle* (1857), 7 Ir. C. L. R. 598.

(*w*) *Holnes v. Binney* (1838), 4 Bing. N. C. 454.

(*x*) Per Parke, B., in *Steward v. Greaves* (1842), 10 M. & W. 711, at p. 721. Cf. *Todd v. Wright* (1847), 16 L. J. Q. B. 311, at p. 312; 11 Jur. 471.

A change in the occupancy of the office *pendente lite* did not affect the action (*y*).

There could not be a public officer of a company which had not begun to carry on business (*z*). But the fact of stopping payment did not prevent a company from suing and being sued by its public officer (*a*).

If the company changed its name, the public officer's position was unaffected (*b*).

The return made by the company was not the only admissible evidence of the fact of the plaintiff being one of the public officers of the company. It might be proved *aliunde* (*c*).

The office of public registered officer of a banking co-partnership not being an annual office, a person once appointed to such an office was presumed to continue in it until the contrary was shown; and therefore a return made to the Stamp Office in March, 1841, verified by affidavit, stating a person to be a public officer of the company, was held to be evidence of his being so in November, 1842. A copy of such return, certified by a commissioner of stamps, under 7 Geo. 4, c. 46, s. 6, was evidence of the facts stated in it, and it was not necessary to prove that the affidavit annexed to the return was made by the public officer. And where a deed constituting a banking co-partnership contained a stipulation, that, if any of the public officers should become bankrupt, he should be disqualified, and his office become vacant, it was held that the true construction of the clause was, not that the party should cease to be a public officer absolutely, but at the election of the company (*d*).

The public officer could not sue as representing all the members of the company except one in a suit between the latter and the former as members (*e*). But the public officer might sue some of the members if the question in dispute were one between the company collectively and those individual members. For example, he might sue the directors for the purpose of making them account for breaches of trust

(*y*) 7 Geo. 4, c. 46, s. 9; *Webb v. Taylor* (1843), 8 Jur. 39; 1 D. & L. 676; 13 L. J. Q. B. 24; *Barnewall v. Sutherland* (1850), 9 C. B. 380.

(*z*) *Roe v. Fuller* (1852), 7 Ex. 220; *Steward v. Dunn* (1843), 11 M. & W. 63; *Fletcher v. Crosbie* (1841), 9 M. & W. 252. Cf. *Davidson v. Bower* (1842), 4 M. & G. 626.

(*a*) *Davidson v. Cooper* (1843), 11 M. &

W. 778. Cf. *Needham v. Law* (1843), 11 M. & W. 400.

(*b*) *Wilson v. Craven* (1841), 8 M. & W. 584.

(*c*) *Edwards v. Buchanan* (1832), 3 B. & Ad. 788.

(*d*) *Steward v. Dunn* (1844), 12 M. & W. 655.

(*e*) *Seddon v. Connell* (1840), 10 Sim. 58; 9 L. J. N. S. Ch. 341.

and mismanagement (*f*), or a shareholder for calls made payable by him to the company (*g*).

Notwithstanding the general rule that actions should be brought by the public officer, a manager might be authorized to sue on bills received by the company and indorsed in blank (*h*), or upon an instrument made payable to him by his description (*i*).

Execution.

The 7 Geo. 4, c. 46, provided:—

13. That execution upon any judgment in any action obtained against any public officer for the time being of any such corporation or copartnership carrying on the business of banking under the provisions of this Act, whether as plaintiff or defendant, may be issued against any member or members for the time being of such corporation or copartnership; and that in case any such execution against any member or members for the time being (*k*) of any such corporation or copartnership shall be ineffectual (*l*) for obtaining payment and satisfaction of the amount of such judgment, it shall be lawful for the party or parties so having obtained judgment against such public officer for the time being to issue execution against any person or persons who was or were a member or members of such corporation or copartnership at the time when the contract or contracts or engagement or engagements in which such judgment may have been obtained was or were entered into, or became a member at any time before such contracts or engagements were executed, or was a member at the time of the judgment obtained (*m*): Provided always, that no such execution as last mentioned shall be issued without leave first granted, on motion in open Court, by the Court in which such judgment shall have been obtained, and when motion shall be made on notice to the person or persons sought to be charged, nor after the expiration of three years (*n*) next after any such person or persons shall have ceased to be a member or members of such corporation or copartnership.

(*f*) *Harrison v. Brown* (1852), 5 De G. & S. 728.

(*g*) See *Chapman v. Milvain* (1850), 5 Ex. 61; *Ex parte Hall* (1838), 3 Deac. 405; 7 Geo. 4, c. 46.

(*h*) *Law v. Parnell* (1859), 7 C. B. N. S. 282. Cf. *M^r Dowell v. Doyle* (1857), 7 Ir. C. L. R. 598.

(*i*) *Robertson v. Sheward* (1840), 1 M. & G. 511.

(*k*) See *Dodgson v. Scott* (1848), 2 Ex. 457; *Bradley v. Eyre* (1843), 11 M. & W. 432.

(*l*) See *Dodgson v. Scott*, referred to in last note; *Harvey v. Scott* (1847), 11 Q. B. 92; *Field v. Mackenzie* (1847), 4 C. B. 705, at p. 732; *Eardley v. Law* (1840), 12 A. & E. 802; *Cross v. Law* (1840), 6 M. & W. 217; *Bank of England v. Johnson* (1849), 3 Ex. 598.

(*m*) *Dodgson v. Scott*, note (*k*), *supra*; *Harvey v. Scott* (1847), 11 Q. B. 92.

(*n*) See *Barker v. Buttress* (1843), 7 Beav. 134; 13 L. J. Ch. 58; 8 Jur. 89; *Ex parte Gouthwaite* (1851), 3 Mac. & G. 187; 20 L. J. Ch. 188; 15 Jur. 137.

While the public officer against whom judgment had been obtained continued to be a member of the company execution might be issued against him without any intermediate procedure (o).

As to other members, proceedings by *scire facias* were formerly necessary (p).

A new form of procedure was introduced by Ord. XLII. r. 23 (d), of the Rules of the Supreme Court, whereby it is provided that—

Where a party is entitled to execution against any of the shareholders of a joint stock company upon a judgment recorded against such company, or against a public officer or other person representing such company, the party alleging himself to be entitled to execution may apply to the Court or a judge for leave to issue execution accordingly. And such Court or judge may, if satisfied that the party so applying is entitled to issue execution, make an order to that effect, or may order that any issue or question necessary to determine the rights of the parties shall be tried in any of the ways in which any question in an action may be tried. And in either case such Court or judge may impose such terms as to costs or otherwise as shall be just (q).

The rights of creditors, whether by specialty or simple contract, to obtain payment of their debts out of the assets of a deceased shareholder, were barred after the lapse of three years from his death (r). Even within this period the executors were only liable in respect of such debts as the surviving shareholders were unable to discharge (s).

Indemnity.—The public officer was entitled to be indemnified by the members against judgments obtained against him as such (t). So an individual shareholder, against whom execution had been issued for a debt of the company, was entitled to be indemnified by the company, or to receive contribution from his fellow-shareholders (u).

(o) *Harwood v. Law* (1840), 7 M. & W. 203.

(p) *Ransford v. Bosanquet* (1842), 2 Q. B. 972; *Bosanquet v. Ransford* (1840), 11 A. & E. 520; *Cross v. Law* (1840), 6 M. & W. 217; *Whittenbury v. Law* (1840), 6 Bing. N. C. 345.

(q) As to service of proceedings against a late member, see *Esdaile v. Smith* (1848), 18 L. J. Ex. 120; and as to registering a judgment against an individual shareholder, see *Harris v. Royal British Bank*

(1857), 2 H. & N. 535; *Hone v. O'Flahertie* (1859), 9 Ir. Ch. 119; *In re Barned's Banking Co., Ex parte Thornton* (1867), 2 Ch. 171.

(r) See *Barker v. Buttress* (1843), 7 Beav. 134; 13 L. J. Ch. 58; 8 Jur. 89.

(s) *Heward v. Wheatley, Ex parte Wilson* (1852), 5 De G. & S. 552; 16 Jur. 1132; 21 L. J. Ch. 854. Cf. *In re Wallon's Estate* (1857), 23 Beav. 480.

(t) 7 Geo. 4, c. 46, s. 14.

(u) *Ibid.*; 8 & 9 Vict. c. 16, s. 37.

Form of Indictments.

In indictments by or on behalf of banking companies established under the 7 Geo. 4, c. 46, the name of one of the public officers might be used in lieu of the names of the persons forming the company (*v*).

Position of Trustee.

In *Heinrich v. Sutton* (*w*) the deed of settlement of a banking company which had been established under the 7 Geo. 4, c. 46, contained a proviso that, where property was vested in trustees, the court of directors should have power to direct any actions or suits to be commenced, prosecuted, or defended, on account of the property of the bank, and to direct the necessary parties to such actions or suits to carry them on or defend them, and that such parties should be indemnified out of the funds of the bank. H., in whom property was vested as one of the trustees of the bank, and who had executed the deed, was made co-defendant, with two other trustees, in a suit by persons claiming the property adversely to the bank. The solicitors of the bank entered an appearance for H. without his knowledge. It was held on a motion by H. to expunge the appearance as irregular, that the provision in the deed of settlement operated as an authority to the bank to use the names of their trustees in any action or suit, and that the solicitor of the bank was entitled to enter an appearance for H., and conduct the defence for him. But the Court inclined to the view that a trustee, under those circumstances, would be entitled to the costs of independent advice for his own security, if he required it, in putting in an answer or affidavit in the suit.

Lord Justice Mellish, in giving judgment, said: "The question appears to me entirely to turn on the effect of the deed of settlement of the bank. The bank is not a corporation, but it is formed under the original banking Act, and is entitled to sue and be sued in the name of its public officer. Now a bank of that kind cannot vest its property in its public officer, and, of course, not being a corporation, cannot vest property in itself. It must necessarily vest all its property in trustees. Accordingly, a deed of settlement of this kind usually provides that there shall be trustees; but the trustees are merely persons who, in every respect, are to act under the directions and control of the board of directors, and the management of the affairs of

(*v*) 7 Geo. 4, c. 46, s. 9; 1 & 2 Vict. c. 96; 3 & 4 Vict. c. 111, s. 2; 5 & 6 Vict. c. 85, s. 1. Cf. *Reg. v. Atkinson* (1843), 2 Moo. C. C. 278; *Reg. v. Prit-*

chard (1861), 8 Cox, C. C. 461; L. & C. 34; 30 L. J. M. C. 169; 1 Russell on Crimes, 6th ed. 30, note (*e*).

(*w*) (1871), 6 Ch. 220.

the bank is in the board of directors." After referring to the material clauses of the deed of settlement, his Lordship proceeded: "It appears to me perfectly plain that the real meaning of this deed is, that the trustees are to be simply persons into whose names the trust funds are to be transferred, and who may either have to bring actions, or may have actions brought against them respecting that which is the property of the bank; but the bringing and defending of all such actions in the names of the trustees is to be done by the bank, and the bank is to indemnify the trustee or any other person whose name is so used out of the funds and property of the bank. Now, it is admitted that this is a suit brought exclusively respecting the funds and property of the bank. I am of opinion, therefore, that the ordinary solicitors of the company were perfectly entitled to use this gentleman's name for the purpose of entering an appearance and conducting the defence. No doubt, when he is required to do something personally, such as to put in an answer or make an affidavit, he is entitled to be properly advised, so that he may say nothing which is untrue or which is improper for him to say; but, beyond that, it appears to me it is the express provision of the deed that the defence is to be conducted by the bank alone. I think we should be doing very great harm if, in the case of a gentleman who is a trustee or director, and then unfortunately afterwards, as it happened in this case, quarrels with the directors of the company, we were to allow him to take upon himself in any respect the conduct of the defence, which is the defence of the bank, and take it out of the hands of the directors."

Bankruptcy Proceedings.

The Bankruptcy Acts applied to these companies (x).

The company might be a petitioning creditor in bankruptcy (y). It might prove in the bankruptcy of one of its own members (z).

Winding-up.

The company might be wound up under the Companies Act, 1862 (a). This was of great practical importance, as a creditor had thus a remedy which was usually of a more satisfactory character than the procedure described above.

(x) Bankruptcy Rules, 1886, r. 258.
See *Davison v. Farmer* (1851), 6 Ex. 242.

(y) Bankruptcy Rules, 1886, r. 258.
See *Ex parte Torkington*, *In re Torkington* (1874), 9 Ch. 298.

(z) *In re Caldecott* (1841), 2 M. D. & D. 368.

(a) Sects. 199 *et seq.* See pp. 38—40, *supra*.



B.—SPECIALLY CONSTITUTED BANKS.

It has been pointed out (*a*) that certain banks, whose business is specially concerned with places outside England, but which have offices here, have been constituted by Royal Charters and private Acts of Parliament (*b*).

As regards their relations with persons dealing with them in this country, the general principles of law which have been discussed in the preceding pages are applicable. The peculiarities of their internal arrangements and constitution must be sought in the various Charters and Acts to which they respectively owe their existence. To set them out here would be of little, if any, value, even if it were, in point of space, practicable (*c*).

The Acts may be readily found by reference to the index to Local and Personal Acts, 1801—1899, and to the indexes to the Local and Private Acts in the annual editions of the statutes for subsequent years, under the heading “Trading and other Companies—(1) Banking and Investment” (*d*).

(*a*) At p. 5, note (*b*), *supra*.

(*b*) Parliament has even intervened by special Act in the case of companies registered under the Companies Acts: see, *e.g.*, 52 & 53 Vict. c. cxxii.; 57 Vict. c. viii.; 58 Vict. c. iii.; 58 & 59 Vict. c. xlv.; 59 Vict. c. xv.

(*c*) It may be added that in Scotland these specially constituted banks play a very important and, indeed, predominating part.

(*d*) In Lindley on Companies, 6th ed. p. 1343, note (*d*), treating of the various classes of banks, it is said: “There may, perhaps, be yet another class, viz., companies formed before the 6th of May, 1844, and subsequently incorporated by Royal Charter under 7 & 8 Vict. c. 113, s. 46, but not registered

under any of the later Acts. Such a company might possibly be considered as not having been formed under 7 & 8 Vict. c. 113, within the meaning of 20 & 21 Vict. c. 49, s. 4; and, if so, registration under this last Act would not be compulsory, and if not compulsory under that Act, it is not compulsory under the Act of 1862 (see sect. 209). If, however, the incorporation of the company by charter be considered as the formation of the company within the meaning of 20 & 21 Vict. c. 49, s. 4, then the registration of the company is imperative, and the class under consideration cannot legally exist. The latter view the writer conceives to be correct.” Whether or not there were formerly such banks, none has been in existence for a considerable time past.

APPENDIX II.

THE BILLS OF EXCHANGE ACT, 1882.

(45 & 46 VICT. c. 61.)

An Act (a) to codify (b) the law relating to Bills of Exchange, Cheques, and Promissory Notes. [18th August, 1882.]

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

PART I.—PRELIMINARY.

1. This Act may be cited as the Bills of Exchange Act, Short title. 1882.

2. In this Act, unless the context otherwise requires,—
- | | |
|--------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------|
| “Acceptance” means an acceptance completed by delivery or notification. | Interpreta-
tion of terms. |
| “Action” includes counter claim and set off. | |
| “Banker” includes a body of persons whether incorporated or not who carry on the business of banking. | |
| “Bankrupt” includes any person whose estate is vested in a trustee or assignee under the law for the time being in force relating to bankruptcy. | |
| “Bearer” means the person in possession of a bill or note which is payable to bearer (c). | |
| “Bill” means bill of exchange, and “note” means promissory note. | |
| “Delivery” means transfer of possession, actual or constructive, from one person to another. | |

(a) Reference is made in the footnotes to the more important cases decided since the passing of the Act which bear upon the construction of the clauses or words indicated.

(b) See per Lord Herschell in *Bank of England v. Vagliano Brothers*, [1891] A. C. 107, at p. 144; see p. 366, *supra*; *M'Lean v. Clydesdale Banking Co.* (1883), 9 A. C. 95.

(c) See *Day v. Longhurst*, W. N. (1893) 3.

- “Holder” means the payee or indorsee of a bill or note who is in possession of it, or the bearer thereof.
- “Indorsement” means an indorsement completed by delivery.
- “Issue” means the first delivery of a bill or note, complete in form to a person who takes it as a holder (*d*).
- “Person” includes a body of persons whether incorporated or not.
- “Value” means valuable consideration.
- “Written” includes printed, and “writing” includes print.

PART II.—BILLS OF EXCHANGE.

Form and Interpretation.

Bill of
exchange
defined.

3.—(1.) A bill of exchange is an unconditional (*e*) order in writing (*f*), addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to or to the order of a specified person, or to bearer (*g*).

(2.) An instrument which does not comply with these conditions, or which orders any act to be done in addition to the payment of money, is not a bill of exchange.

(3.) An order to pay out of a particular fund is not unconditional within the meaning of this section; but an unqualified order to pay, coupled with (a) an indication of a particular fund out of which the drawee is to re-imburse himself or a particular account to be debited with the amount (*h*), or (b) a statement of the transaction which gives rise to the bill, is unconditional.

(4.) A bill is not invalid by reason—

- (a) That it is not dated;
- (b) That it does not specify the value given, or that any value has been given therefor;
- (c) That it does not specify the place where it is drawn or the place where it is payable.

Inland and
foreign bills.

4.—(1.) An inland bill is a bill which is or on the face of it purports to be (a) both drawn and payable within the British Islands, or (b) drawn within the British Islands upon some person resident therein. Any other bill is a foreign bill.

For the purposes of this Act “British Islands” mean any

(*d*) See *Clutton v. Attenborough*, [1897] A. C. 90; see p. 305, *supra*.

(*e*) *Bavins, Junr. and Sims v. London and South Western Bank*, [1900] 1 Q. B. 270; see p. 489, *supra*.

(*f*) In any language: *In re Marseilles, &c. Co.* (1885), 30 Ch. D. 598. See also *New London Credit Syndicate v. Neale*, [1898] 2 Q. B. 487.

(*g*) *M'Lean v. Clydesdale Banking Co.* (1883), 9 A. C. 95; see p. 256, *supra*.

(*h*) *In re Boyse, Crofton v. Crofton* (1886), 33 Ch. D. 612; see pp. 116, 345, *supra*.

part of the United Kingdom of Great Britain and Ireland, the islands of Man, Guernsey, Jersey, Alderney, and Sark, and the islands adjacent to any of them being part of the dominions of Her Majesty.

(2.) Unless the contrary appear on the face of the bill the holder may treat it as an inland bill.

5.—(1.) A bill may be drawn payable to, or to the order of, the drawer (*i*); or it may be drawn payable to, or to the order of, the drawee.

Effect where different parties to bill are the same person.

(2.) Where in a bill drawer and drawee are the same person, or where the drawee is a fictitious person or a person not having capacity to contract, the holder may treat the instrument, at his option, either as a bill of exchange or as a promissory note.

6.—(1.) The drawee must be named or otherwise indicated in a bill with reasonable certainty.

Address to drawee.

(2.) A bill may be addressed to two or more drawees whether they are partners or not, but an order addressed to two drawees in the alternative or to two or more drawees in succession is not a bill of exchange.

7.—(1.) Where a bill is not payable to bearer, the payee must be named or otherwise indicated therein with reasonable certainty.

Certainty required as to payee.

(2.) A bill may be made payable to two or more payees jointly, or it may be made payable in the alternative to one of two, or one or some of several payees. A bill may also be made payable to the holder of an office for the time being.

(3.) Where the payee is a fictitious or non-existing person the bill may be treated as payable to bearer (*k*).

8.—(1.) When a bill contains words prohibiting transfer, or indicating an intention that it should not be transferable, it is valid as between the parties thereto, but is not negotiable (*l*).

What bills are negotiable.

(2.) A negotiable bill may be payable either to order or to bearer.

(3.) A bill is payable to bearer which is expressed to be so payable, or on which the only or last indorsement is an indorsement in blank.

(4.) A bill is payable to order which is expressed to be so payable, or which is expressed to be payable to a particular person, and does not contain words prohibiting transfer or indicating an intention that it should not be transferable (*m*).

(5.) Where a bill, either originally or by indorsement, is

(*i*) *Chamberlain v. Young*, [1893] 2 Q. B. 206; see p. 243, *supra*.

(*k*) *Bank of England v. Vagliano Brothers*, [1891] A. C. 107; see p. 366, *supra*; *Clutton v. Attenborough & Son*, [1897] A. C. 90; see p. 305, *supra*.

(*l*) *National Bank v. Silke*, [1891] 1 Q. B. 435; see p. 244, *supra*.

(*m*) *Meyer & Co. v. Decroix, Verley et Cie.*, [1891] A. C. 520; see p. 350, *supra*.

expressed to be payable to the order of a specified person, and not to him or his order, it is nevertheless payable to him or his order at his option.

Sum payable. 9.—(1.) The sum payable by a bill is a sum certain within the meaning of this Act, although it is required to be paid—

- (a) With interest.
- (b) By stated instalments.
- (c) By stated instalments, with a provision that upon default in payment of any instalment the whole shall become due.
- (d) According to an indicated rate of exchange or according to a rate of exchange to be ascertained as directed by the bill.

(2.) Where the sum payable is expressed in words and also in figures, and there is a discrepancy between the two, the sum denoted by the words is the amount payable.

(3.) Where a bill is expressed to be payable with interest, unless the instrument otherwise provides, interest runs from the date of the bill, and if the bill is undated from the issue thereof.

Bill payable
on demand.

10.—(1.) A bill is payable on demand—

- (a) Which is expressed to be payable on demand, or at sight, or on presentation; or
- (b) In which no time for payment is expressed (n).

(2.) Where a bill is accepted or indorsed when it is overdue, it shall, as regards the acceptor who so accepts, or any indorser who so indorses it, be deemed a bill payable on demand.

Bill payable
at a future
time.

11. A bill is payable at a determinable future time within the meaning of this Act which is expressed to be payable—

- (1.) At a fixed period after date or sight.
- (2.) On or at a fixed period after the occurrence of a specified event which is certain to happen, though the time of happening may be uncertain.

An instrument expressed to be payable on a contingency is not a bill, and the happening of the event does not cure the defect (o).

Omission of
date in bill
payable after
date.

12. Where a bill expressed to be payable at a fixed period after date is issued undated, or where the acceptance of a bill payable at a fixed period after sight is undated, any holder may insert therein the true date of issue or acceptance, and the bill shall be payable accordingly.

(n) *Royal Bank of Scotland v. Tottenham*, [1894] 2 Q. B. 715; see pp. 147, 246, *supra*.

(o) *Bavins, Junr. and Sims v. London and South Western Bank*, [1900] 1 Q. B. 270; see p. 489, *supra*.

Provided that (1) where the holder in good faith and by mistake inserts a wrong date, and (2) in every case where a wrong date is inserted, if the bill subsequently comes into the hands of a holder in due course the bill shall not be avoided thereby, but shall operate and be payable as if the date so inserted had been the true date.

13.—(1.) Where a bill or an acceptance or any indorsement on a bill is dated, the date shall, unless the contrary be proved, be deemed to be the true date of the drawing, acceptance, or indorsement, as the case may be. Ante-dating and post-dating.

(2.) A bill is not invalid by reason only that it is ante-dated or post-dated (*p*), or that it bears date on a Sunday.

14. Where a bill is not payable on demand the day on which it falls due is determined as follows:— Computation of time of payment.

(1.) Three days, called days of grace, are, in every case where the bill itself does not otherwise provide, added to the time of payment as fixed by the bill, and the bill is due and payable on the last day of grace (*q*): Provided that—

(a) When the last day of grace falls on Sunday, Christmas Day, Good Friday, or a day appointed by Royal proclamation as a public fast or thanksgiving day, the bill is, except in the case hereinafter provided for, due and payable on the preceding business day;

(b) When the last day of grace is a bank holiday (other than Christmas Day or Good Friday) under the Bank Holidays Act, 1871, and Acts amending or extending it, or when the last day of grace is a Sunday and the second day of grace is a Bank Holiday, the bill is due and payable on the succeeding business day. 34 & 35 Vict. c. 17.

(2.) Where a bill is payable at a fixed period after date, after sight, or after the happening of a specified event, the time of payment is determined by excluding the day from which the time is to begin to run and by including the day of payment.

(3.) Where a bill is payable at a fixed period after sight, the time begins to run from the date of the acceptance if the bill be accepted, and from the date of noting or protest if the bill be noted or protested for non-acceptance, or for non-delivery.

(4.) The term “month” in a bill means calendar month.

15. The drawer of a bill and any indorser may insert therein the name of a person to whom the holder may resort in case of need, that is to say, in case the bill is dishonoured by non-acceptance or non-payment. Such person is called Case of need.

(*p*) *Royal Bank of Scotland v. Tottenham*, [1894] 2 Q. B. 715; see pp. 147, 246, *supra*.

(*q*) *Kennedy v. Thomas*, [1894] 2 Q. B. 759; see pp. 409, 447, *supra*.

the referee in case of need. It is in the option of the holder to resort to the referee in case of need or not as he may think fit.

Optional stipulations by drawer or indorser.

16. The drawer of a bill, and any indorser, may insert therein an express stipulation—

- (1.) Negativating or limiting his own liability to the holder :
- (2.) Waiving as regards himself some or all of the holder's duties.

Definition and requisites of acceptance.

17.—(1.) The acceptance of a bill is the signification by the drawee of his assent to the order of the drawer.

(2.) An acceptance is invalid unless it complies with the following conditions, namely :

- (a) It must be written on the bill and be signed by the drawee.

The mere signature of the drawee without additional words is sufficient.

- (b) It must not express that the drawee will perform his promise by any other means than the payment of money.

Time for acceptance.

18. A bill may be accepted—

- (1.) Before it has been signed by the drawer, or while otherwise incomplete :
- (2.) When it is overdue, or after it has been dishonoured by a previous refusal to accept, or by non-payment :
- (3.) When a bill payable after sight is dishonoured by non-acceptance, and the drawee subsequently accepts it, the holder, in the absence of any different agreement, is entitled to have the bill accepted as of the date of first presentment to the drawee for acceptance.

General and qualified acceptances.

19.—(1.) An acceptance is either (a) general or (b) qualified.
(2.) A general acceptance assents without qualification to the order of the drawer. A qualified acceptance in express terms varies the effect of the bill as drawn (*r*).

In particular an acceptance is qualified which is—

- (a) conditional, that is to say, which makes payment by the acceptor dependent on the fulfilment of a condition therein stated :
- (b) partial, that is to say, an acceptance to pay part only of the amount for which the bill is drawn :
- (c) local, that is to say, an acceptance to pay only at a particular specified place :

An acceptance to pay at a particular place is a general acceptance, unless it expressly states that the bill is to be paid there only and not elsewhere :

- (d) qualified as to time :
- (e) the acceptance of some one or more of the drawees, but not of all.

(*r*) *Meyer & Co. v. Decroix, Verley et Cie.*, [1891] A. C. 520 ; see p. 350, *supra*.

20.—(1.) Where a simple signature on a blank stamped paper is delivered by the signer in order that it may be converted into a bill, it operates as a *prima facie* authority to fill it up as a complete bill for any amount the stamp will cover, using the signature for that of the drawer, or the acceptor, or an indorser; and, in like manner, when a bill is wanting in any material particular, the person in possession of it has a *prima facie* authority to fill up the omission in any way he thinks fit. Inchoate instruments.

(2.) In order that any such instrument when completed may be enforceable against any person who became a party thereto prior to its completion, it must be filled up within a reasonable time, and strictly in accordance with the authority given. Reasonable time for this purpose is a question of fact.

Provided that if any such instrument after completion is negotiated to a holder in due course it shall be valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up within a reasonable time and strictly in accordance with the authority given (s).

21.—(1.) Every contract on a bill, whether it be the drawer's, the acceptor's, or an indorser's, is incomplete and revocable, until delivery of the instrument in order to give effect thereto. Delivery.

Provided that where an acceptance is written on a bill, and the drawee gives notice to or according to the directions of the person entitled to the bill that he has accepted it, the acceptance then becomes complete and irrevocable.

(2.) As between immediate parties, and as regards a remote party other than a holder in due course, the delivery—

- (a) in order to be effectual must be made either by or under the authority of the party drawing, accepting, or indorsing, as the case may be:
- (b) may be shown to have been conditional or for a special purpose only, and not for the purpose of transferring the property in the bill (t).

But if the bill be in the hands of a holder in due course a valid delivery of the bill by all parties prior to him so as to make them liable to him is conclusively presumed (s).

(3.) Where a bill is no longer in the possession of a party who has signed it as drawer, acceptor, or indorser, a valid and unconditional delivery by him is presumed until the contrary is proved.

Capacity and Authority of Parties.

22.—(1.) Capacity to incur liability as a party to a bill is co-extensive with capacity to contract (u). Capacity of parties.

(s) *Herdman v. Wheeler*, [1902] 1 K. B. 361.

(t) *New London Credit Syndicate v. Neale*, [1898] 2 Q. B. 487.

(u) *In re Soltykoff, Ex parte Margrett*, [1891] 1 Q. B. 413; *Smith v. King*, [1892] 2 Q. B. 543; *Imperial Loan Co. v. Stone*, [1892] 1 Q. B. 599.

Provided that nothing in this section shall enable a corporation to make itself liable as drawer, acceptor, or indorser of a bill unless it is competent to it so to do under the law for the time being in force relating to corporations.

(2.) Where a bill is drawn or indorsed by an infant, minor, or corporation having no capacity or power to incur liability on a bill, the drawing or indorsement entitles the holder to receive payment of the bill, and to enforce it against any other party thereto.

Signature
essential to
liability.

23. No person is liable as drawer, indorser, or acceptor of a bill who has not signed it as such: Provided that—

- (1.) Where a person signs a bill in a trade or assumed name, he is liable thereon as if he had signed it in his own name:
- (2.) The signature of the name of a firm is equivalent to the signature by the person so signing of the names of all persons liable as partners in that firm.

Forged or
unauthorized
signature.

24. Subject to the provisions of this Act, where a signature on a bill is forged or placed thereon without the authority of the person whose signature it purports to be, the forged or unauthorized signature is wholly inoperative, and no right to retain the bill or to give a discharge therefor or to enforce payment thereof against any party thereto can be acquired through or under that signature, unless the party against whom it is sought to retain or enforce payment of the bill is precluded from setting up the forgery or want of authority (x).

Provided that nothing in this section shall affect the ratification of an unauthorized signature not amounting to a forgery.

Procurator
signatures.

25. A signature by procurator operates as notice that the agent has but a limited authority to sign, and the principal is only bound by such signature if the agent in so signing was acting within the actual limits of his authority (y).

Person sign-
ing as agent
or in repre-
sentative
capacity.

26.—(1.) Where a person signs a bill as drawer, indorser, or acceptor, and adds words to his signature, indicating that he signs for or on behalf of a principal, or in a representative character, he is not personally liable thereon; but the mere addition to his signature of words describing him as an agent, or as filling a representative character, does not exempt him from personal liability.

(2.) In determining whether a signature on a bill is that of

(x) *Capital and Counties Bank v. Gordon*, [1903] A. C. 240; see pp. 84, 190, 243, 286, 289, 495, *supra*; *Lacave & Co. v. Crédit Lyonnais*, [1897] 1 Q. B. 148; see p. 484, *supra*.

(y) *In re Cunningham & Co., Ltd., Simpson's Claim* (1887), 36 Ch. D. 532; *Jonnenjoy Coondoo v. Watson* (1884), 9 A. C. 561; *Reid v. Rigby & Co.*, [1894] 2 Q. B. 40; see p. 354, *supra*; *Jacobs v. Morris*, [1902] 1 Ch. 816; see p. 608, *supra*; *Bryant, Powis and Bryant v. Banque du Peuple*, [1893] A. C. 170; see p. 353, *supra*.

the principal or that of the agent by whose hand it is written, the construction most favourable to the validity of the instrument shall be adopted.

The Consideration for a Bill.

27.—(1.) Valuable consideration for a bill may be constituted by— Value and holder for value.

(a) Any consideration sufficient to support a simple contract;

(b) An antecedent debt or liability (z). Such a debt or liability is deemed valuable consideration whether the bill is payable on demand or at a future time.

(2.) Where value has at any time been given for a bill the holder is deemed to be a holder for value as regards the acceptor and all parties to the bill who became parties prior to such time.

(3.) Where the holder of a bill has a lien on it, arising either from contract or by implication of law, he is deemed to be a holder for value to the extent of the sum for which he has a lien.

28.—(1.) An accommodation party to a bill is a person who has signed a bill as drawer, acceptor, or indorser, without receiving value therefor, and for the purpose of lending his name to some other person. Accommodation bill or party.

(2.) An accommodation party is liable on the bill to a holder for value; and it is immaterial whether, when such holder took the bill, he knew such party to be an accommodation party or not.

29.—(1.) A holder in due course is a holder who has taken (a) a bill, complete and regular (b) on the face of it, under the following conditions; namely:— Holder in due course.

(a) That he became the holder of it before it was overdue, and without notice that it had been previously dishonoured, if such was the fact:

(b) That he took the bill in good faith and for value, and that at the time the bill was negotiated to him he had no notice of any defect in the title of the person who negotiated it.

(2.) In particular the title of a person who negotiates a bill is defective within the meaning of this Act when he obtained the bill, or the acceptance thereof, by fraud, duress, or force and fear, or other unlawful means, or for an illegal considera-

(z) *London and County Bank v. London and River Plate Bank* (1888), 21 Q. B. D. 535; see p. 776, *supra*; *Fleming v. Bank of New Zealand*, [1900] A. C. 577; see p. 192, *supra*; *Young v. Gordon* (1896), 23 Sess. Cas. 419.

(a) *Lewis v. Clay* (1897), 14 T. L. R. 149; see p. 262, *supra*; *Herdman v. Wheeler*, [1902] 1 K. B. 361.

(b) *Hitchcock v. Edwards* (1889), 60 L. T. 636; see p. 246, *supra*.

tion, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud.

(3.) A holder (whether for value or not) who derives his title to a bill through a holder in due course, and who is not himself a party to any fraud or illegality affecting it, has all the rights of that holder in due course as regards the acceptor and all parties to the bill prior to that holder.

Presumption
of value and
good faith.

30.—(1.) Every party whose signature appears on a bill is *prima facie* deemed to have become a party thereto for value.

(2.) Every holder of a bill is *prima facie* deemed to be a holder in due course; but if in an action on a bill it is admitted or proved (c) that the acceptance, issue, or subsequent negotiation of the bill is affected with fraud, duress, or force and fear, or illegality, the burden of proof is shifted, unless and until the holder proves that, subsequent to the alleged fraud or illegality (d), value has in good faith been given for the bill.

Negotiation of Bills.

Negotiation
of bill.

31.—(1.) A bill is negotiated when it is transferred from one person to another in such a manner as to constitute the transferee the holder of the bill (e).

(2.) A bill payable to bearer is negotiated by delivery.

(3.) A bill payable to order is negotiated by the indorsement of the holder completed by delivery.

(4.) Where the holder of a bill payable to his order transfers it for value without indorsing it, the transfer gives the transferee such title as the transferor had in the bill, and the transferee in addition acquires the right to have the indorsement of the transferor.

(5.) Where any person is under obligation to indorse a bill in a representative capacity, he may indorse the bill in such terms as to negative personal liability.

Requisites
of a valid
indorsement.

32. An indorsement in order to operate as a negotiation must comply with the following conditions, namely:—

(1.) It must be written on the bill itself and be signed by the indorser. The simple signature of the indorser on the bill, without additional words, is sufficient.

An indorsement written on an allonge, or on a "copy" of a bill issued or negotiated in a country where "copies" are recognised, is deemed to be written on the bill itself.

(2.) It must be an indorsement of the entire bill. A partial indorsement, that is to say, an indorsement which purports to transfer to the indorsee a part only of the amount payable, or which purports to transfer the bill to two or more indorsees severally, does not operate as a negotiation of the bill.

(c) *Tatam v. Haslar* (1889), 23 Q. B. D. 345, at pp. 348-9.

(d) *Woolf v. Hamilton*, [1898] 2 Q. B. 337.

(e) *Day v. Longhurst*, W. N. (1893) 3.

- (3.) Where a bill is payable to the order of two or more payees or indorsees who are not partners all must indorse, unless the one indorsing has authority to indorse for the others.
- (4.) Where, in a bill payable to order, the payee or indorsee is wrongly designated, or his name is misspelt, he may indorse the bill as therein described, adding, if he think fit, his proper signature.
- (5.) Where there are two or more indorsements on a bill, each indorsement is deemed to have been made in the order in which it appears on the bill, until the contrary is proved.
- (6.) An indorsement may be made in blank or special. It may also contain terms making it restrictive.

33. Where a bill purports to be indorsed conditionally the condition may be disregarded by the payer, and payment to the indorsee is valid whether the condition has been fulfilled or not. Conditional indorsement.

34.—(1.) An indorsement in blank specifies no indorsee, and a bill so indorsed becomes payable to bearer. Indorsement in blank and special indorsement.

(2.) A special indorsement specifies the person to whom, or to whose order, the bill is to be payable.

(3.) The provisions of this Act relating to a payee apply with the necessary modifications to an indorsee under a special indorsement.

(4.) When a bill has been indorsed in blank, any holder may convert the blank indorsement into a special indorsement by writing above the indorser's signature a direction to pay the bill to or to the order of himself or some other person.

35.—(1.) An indorsement is restrictive which prohibits the further negotiation of the bill or which expresses that it is a mere authority to deal with the bill as thereby directed and not a transfer of the ownership thereof, as, for example, if a bill be indorsed "Pay D. only," or "Pay D. for the account of X.," or "Pay D. or order for collection." Restrictive indorsement.

(2.) A restrictive indorsement gives the indorsee the right to receive payment of the bill and to sue any party thereto that his indorser could have sued, but gives him no power to transfer his rights as indorsee unless it expressly authorize him to do so (f).

(3.) Where a restrictive indorsement authorizes further transfer, all subsequent indorsees take the bill with the same rights and subject to the same liabilities as the first indorsee under the restrictive indorsement.

36.—(1.) Where a bill is negotiable in its origin it continues to be negotiable until it has been (a) restrictively indorsed or (b) discharged by payment or otherwise. Negotiation of overdue or dishonoured bill.

(2.) Where an overdue bill is negotiated, it can only be

(f) *Williams, Deacon & Co. v. Shadbolt* (1885), C. & E. 529; see p. 470, *supra*.

negotiated subject to any defect of title affecting it at its maturity, and thenceforward no person who takes it can acquire or give a better title than that which the person from whom he took it had.

(3.) A bill payable on demand is deemed to be overdue within the meaning, and for the purposes, of this section, when it appears on the face of it to have been in circulation for an unreasonable length of time. What is an unreasonable length of time for this purpose is a question of fact.

(4.) Except where an indorsement bears date after the maturity of the bill, every negotiation is *prima facie* deemed to have been effected before the bill was overdue.

(5.) Where a bill which is not overdue has been dishonoured any person who takes it with notice of the dishonour takes it subject to any defect of title attaching thereto at the time of dishonour, but nothing in this sub-section shall affect the rights of a holder in due course.

Negotiation
of bill to
party already
liable thereon.

37. Where a bill is negotiated back to the drawer, or to a prior indorser or to the acceptor, such party may, subject to the provisions of this Act, re-issue and further negotiate the bill, but he is not entitled to enforce payment of the bill against any intervening party to whom he was previously liable.

Rights of the
holder.

38. The rights and powers of the holder of a bill are as follows :—

- (1.) He may sue on the bill in his own name :
- (2.) Where he is a holder in due course, he holds the bill free from any defect of title of prior parties, as well as from mere personal defences available to prior parties among themselves, and may enforce payment against all parties liable on the bill :
- (3.) Where his title is defective (a) if he negotiates the bill to a holder in due course, that holder obtains a good and complete title to the bill, and (b) if he obtains payment of the bill the person who pays him in due course gets a valid discharge for the bill.

General duties of the Holder.

When pre-
sentment for
acceptance is
necessary.

39.—(1.) Where a bill is payable after sight, presentment for acceptance is necessary in order to fix the maturity of the instrument.

(2.) Where a bill expressly stipulates that it shall be presented for acceptance, or where a bill is drawn payable elsewhere than at the residence or place of business of the drawee it must be presented for acceptance before it can be presented for payment.

(3.) In no other case is presentment for acceptance necessary in order to render liable any party to the bill.

(4.) Where the holder of a bill, drawn payable elsewhere than at the place of business or residence of the drawee, has

not time, with the exercise of reasonable diligence, to present the bill for acceptance before presenting it for payment on the day that it falls due, the delay caused by presenting the bill for acceptance before presenting it for payment is excused, and does not discharge the drawer and indorsers.

40.—(1.) Subject to the provisions of this Act, when a bill payable after sight is negotiated, the holder must either present it for acceptance or negotiate it within a reasonable time. Time for presenting bill payable after sight.

(2.) If he do not do so, the drawer and all indorsers prior to that holder are discharged.

(3.) In determining what is a reasonable time within the meaning of this section, regard shall be had to the nature of the bill, the usage of trade with respect to similar bills, and the facts of the particular case.

41.—(1.) A bill is duly presented for acceptance which is presented in accordance with the following rules:— Rules as to presentment for acceptance, and excuses for non-presentment.

(a) The presentment must be made by or on behalf of the holder to the drawee or to some person authorized to accept or refuse acceptance on his behalf at a reasonable hour on a business day and before the bill is overdue:

(b) Where a bill is addressed to two or more drawees, who are not partners, presentment must be made to them all, unless one has authority to accept for all, then presentment may be made to him only:

(c) Where the drawee is dead presentment may be made to his personal representative:

(d) Where the drawee is bankrupt, presentment may be made to him or to his trustee:

(e) Where authorized by agreement or usage, a presentment through the post office is sufficient.

(2.) Presentment in accordance with these rules is excused, and a bill may be treated as dishonoured by non-acceptance—

(a) Where the drawee is dead or bankrupt, or is a fictitious person or a person not having capacity to contract by bill:

(b) Where, after the exercise of reasonable diligence, such presentment cannot be effected:

(c) Where although the presentment has been irregular, acceptance has been refused on some other ground.

(3.) The fact that the holder has reason to believe that the bill, on presentment, will be dishonoured does not excuse presentment.

42.—(1.) When a bill is duly presented for acceptance and is not accepted within the customary time, the person presenting it must treat it as dishonoured by non-acceptance. Non-acceptance. If he do not, the holder shall lose his right of recourse against the drawer and indorsers.

Dishonour
by non-
acceptance
and its con-
sequences.

43.—(1.) A bill is dishonoured by non-acceptance—

- (a) when it is duly presented for acceptance, and such an acceptance as is prescribed by this Act is refused or cannot be obtained; or
- (b) when presentment for acceptance is excused and the bill is not accepted.

(2.) Subject to the provisions of this Act when a bill is dishonoured by non-acceptance, an immediate right of recourse against the drawer and indorsers accrues to the holder, and no presentment for payment is necessary.

Duties as to
qualified
acceptances.

44.—(1.) The holder of a bill may refuse to take a qualified acceptance, and if he does not obtain an unqualified acceptance may treat the bill as dishonoured by non-acceptance.

(2.) Where a qualified acceptance is taken, and the drawer or an indorser has not expressly or impliedly authorized the holder to take a qualified acceptance, or does not subsequently assent thereto, such drawer or indorser is discharged from his liability on the bill.

The provisions of this sub-section do not apply to a partial acceptance, whereof due notice has been given. Where a foreign bill has been accepted as to part, it must be protested as to the balance.

(3.) When the drawer or indorser of a bill receives notice of a qualified acceptance, and does not within a reasonable time express his dissent to the holder he shall be deemed to have assented thereto.

Rules as to
presentment
for payment.

45. Subject to the provisions of this Act a bill must be duly presented for payment. If it be not so presented the drawer and indorsers shall be discharged.

A bill is duly presented for payment which is presented in accordance with the following rules:—

- (1.) Where the bill is not payable on demand, presentment must be made on the day it falls due.
- (2.) Where the bill is payable on demand, then, subject to the provisions of this Act, presentment must be made within a reasonable time after its issue in order to render the drawer liable, and within a reasonable time after its indorsement, in order to render the indorser liable.

In determining what is a reasonable time, regard shall be had to the nature of the bill, the usage of trade with regard to similar bills, and the facts of the particular case.

- (3.) Presentment must be made by the holder or by some person authorized to receive payment on his behalf at a reasonable hour on a business day, at the proper place as hereinafter defined, either to the person designated by the bill as payer, or to some person authorized to pay or refuse payment on his behalf if with the exercise of reasonable diligence such person can there be found.

(4.) A bill is presented at the proper place—

(a) Where a place of payment is specified in the bill and the bill is there presented.

(b) Where no place of payment is specified, but the address of the drawee or acceptor is given in the bill, and the bill is there presented.

(c) Where no place of payment is specified and no address given, and the bill is presented at the drawee's or acceptor's place of business if known, and if not, at his ordinary residence if known.

(d) In any other case if presented to the drawee or acceptor wherever he can be found, or if presented at his last known place of business or residence.

(5.) Where a bill is presented at the proper place, and after the exercise of reasonable diligence no person authorized to pay or refuse payment can be found there, no further presentment to the drawee or acceptor is required.

(6.) Where a bill is drawn upon, or accepted by two or more persons who are not partners, and no place of payment is specified, presentment must be made to them all.

(7.) Where the drawee or acceptor of a bill is dead, and no place of payment is specified, presentment must be made to a personal representative, if such there be, and with the exercise of reasonable diligence he can be found.

(8.) Where authorized by agreement or usage a presentment through the post office is sufficient.

46.—(1.) Delay in making presentment for payment is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate presentment must be made with reasonable diligence.

Excuses for delay or non-presentment for payment.

(2.) Presentment for payment is dispensed with,—

(a) Where, after the exercise of reasonable diligence, presentment, as required by this Act, cannot be effected.

The fact that the holder has reason to believe that the bill will, on presentment, be dishonoured, does not dispense with the necessity for presentment.

(b) Where the drawee is a fictitious person.

(c) As regards the drawer where the drawee or acceptor is not bound, as between himself and the drawer, to accept or pay the bill, and the drawer has no reason to believe that the bill would be paid if presented (g).

(g) *In re Boyse, Crofton v. Crofton* (1886), 33 Ch. D. 612; see pp. 116, 345, *supra*.

(d) As regards an indorser, where the bill was accepted or made for the accommodation of that indorser and he has no reason to expect that the bill would be paid if presented (*h*).

(e) By waiver of presentment, express or implied.

Dishonour
by non-pay-
ment.

47.—(1.) A bill is dishonoured by non-payment (*a*) when it is duly presented for payment and payment is refused or cannot be obtained, or (*b*) when presentment is excused and the bill is overdue and unpaid.

(2.) Subject to the provisions of this Act, when a bill is dishonoured by non-payment, an immediate right of recourse against the drawer and indorsers accrues to the holder (*i*).

Notice of
dishonour
and effect
of non-notice.

48. Subject to the provisions of this Act, when a bill has been dishonoured by non-acceptance or by non-payment, notice of dishonour (*j*) must be given to the drawer and each indorser, and any drawer or indorser to whom such notice is not given is discharged; Provided that—

(1.) Where a bill is dishonoured by non-acceptance, and notice of dishonour is not given, the rights of a holder in due course subsequent to the omission, shall not be prejudiced by the omission.

(2.) Where a bill is dishonoured by non-acceptance and due notice of dishonour is given, it shall not be necessary to give notice of a subsequent dishonour by non-payment unless the bill shall in the meantime have been accepted.

Rules as to
notice of
dishonour.

49. Notice of dishonour in order to be valid and effectual must be given in accordance with the following rules:—

- (1.) The notice must be given by or on behalf of the holder, or by or on behalf of an indorser who, at the time of giving it, is himself liable on the bill.
- (2.) Notice of dishonour may be given by an agent either in his own name, or in the name of any party entitled to give notice whether that party be his principal or not.
- (3.) Where the notice is given by or on behalf of the holder, it enures for the benefit of all subsequent holders and all prior indorsers who have a right of recourse against the party to whom it is given.
- (4.) Where notice is given by or on behalf of an indorser entitled to give notice as hereinbefore provided, it enures for the benefit of the holder and all indorsers subsequent to the party to whom notice is given.
- (5.) The notice may be given in writing or by personal communication, and may be given in any terms which sufficiently identify the bill, and intimate that the bill has been dishonoured by non-acceptance or non-payment.

(*h*) *In re Bethell, Bethell v. Bethell* (1887), 34 Ch. D. 561; see p. 267, *supra*.

(*i*) *Kennedy v. Thomas*, [1894] 2 Q. B. 759; see pp. 409, 447, *supra*.

(*j*) *In re Fenwick, Stobart & Co.*, [1902] 1 Ch. 507; see p. 731, *supra*.

- (6.) The return of a dishonoured bill to the drawer or an indorser is, in point of form, deemed a sufficient notice of dishonour.
- (7.) A written notice need not be signed, and an insufficient written notice may be supplemented and validated by verbal communication. A misdescription of the bill shall not vitiate the notice unless the party to whom the notice is given is in fact misled thereby.
- (8.) Where notice of dishonour is required to be given to any person, it may be given either to the party himself, or to his agent in that behalf.
- (9.) Where the drawer or indorser is dead, and the party giving notice knows it, the notice must be given to a personal representative if such there be, and with the exercise of reasonable diligence he can be found.
- (10.) Where the drawer or indorser is bankrupt, notice may be given either to the party himself or to the trustee.
- (11.) Where there are two or more drawers or indorsers who are not partners, notice must be given to each of them, unless one of them has authority to receive such notice for the others.
- (12.) The notice may be given as soon as the bill is dishonoured and must be given within a reasonable time thereafter.

In the absence of special circumstances notice is not deemed to have been given within a reasonable time, unless—

- (a) where the person giving and the person to receive notice reside in the same place, the notice is given or sent off in time to reach the latter on the day after the dishonour of the bill;
 - (b) where the person giving and the person to receive notice reside in different places, the notice is sent off on the day after the dishonour of the bill, if there be a post at a convenient hour on that day, and if there be no such post on that day then by the next post thereafter.
- (13.) Where a bill when dishonoured is in the hands of an agent, he may either himself give notice to the parties liable on the bill, or he may give notice to his principal. If he give notice to his principal, he must do so within the same time as if he were the holder, and the principal upon receipt of such notice has himself the same time for giving notice as if the agent had been an independent holder (*k*).
 - (14.) Where a party to a bill receives due notice of dishonour, he has after the receipt of such notice the same period of time for giving notice to antecedent parties that the holder has after the dishonour.

(*k*) *Fielding & Co. v. Corry*, [1898] 1 Q. B. 268; see p. 452, *supra*.

- (15.) Where a notice of dishonour is duly addressed and posted, the sender is deemed to have given due notice of dishonour, notwithstanding any miscarriage by the post office.

Excuses for
non-notice
and delay.

50.—(1.) Delay in giving notice of dishonour is excused where the delay is caused by circumstances beyond the control of the party giving notice, and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate the notice must be given with reasonable diligence.

(2.) Notice of dishonour is dispensed with—

- (a) When, after the exercise of reasonable diligence, notice as required by this Act cannot be given to or does not reach the drawer or indorser sought to be charged (*l*):
- (b) By waiver express or implied. Notice of dishonour may be waived before the time of giving notice has arrived, or after the omission to give due notice (*m*):
- (c) As regards the drawer in the following cases, namely, (1) where drawer and drawee are the same person, (2) where the drawee is a fictitious person or a person not having capacity to contract, (3) where the drawer is the person to whom the bill is presented for payment, (4) where the drawee or acceptor is as between himself and the drawer under no obligation to accept or pay the bill, (5) where the drawer has countermanded payment:
- (d) As regards the indorser in the following cases, namely, (1) where the drawee is a fictitious person or a person not having capacity to contract and the indorser was aware of the fact at the time he indorsed the bill, (2) where the indorser is the person to whom the bill is presented for payment, (3) where the bill was accepted or made for his accommodation.

Noting or
protest of
bill.

51.—(1.) Where an inland bill has been dishonoured it may, if the holder think fit, be noted for non-acceptance or non-payment, as the case may be; but it shall not be necessary to note or protest any such bill in order to preserve the recourse against the drawer or indorser.

(2.) Where a foreign bill, appearing on the face of it to be such, has been dishonoured by non-acceptance it must be duly protested for non-acceptance, and where such a bill, which has not been previously dishonoured by non-acceptance, is dishonoured by non-payment it must be duly protested for non-payment. If it be not so protested the drawer and indorsers are discharged. Where a bill does not

(*l*) *Studdy v. Beesty* (1889), 60 L. T. 647; see p. 454, *supra*.

(*m*) *Keith v. Burke* (1885), Cab. & E. 551.

appear on the face of it to be a foreign bill, protest thereof in case of dishonour is unnecessary.

(3.) A bill which has been protested for non-acceptance may be subsequently protested for non-payment.

(4.) Subject to the provisions of this Act, when a bill is noted or protested, it must be noted on the day of its dishonour. When a bill has been duly noted, the protest may be subsequently extended as of the date of the noting.

(5.) Where the acceptor of a bill becomes bankrupt or insolvent or suspends payment before it matures, the holder may cause the bill to be protested for better security against the drawer and indorsers.

(6.) A bill must be protested at the place where it is dishonoured: Provided that—

(a) When a bill is presented through the post office, and returned by post dishonoured, it may be protested at the place to which it is returned and on the day of its return if received during business hours, and if not received during business hours, then not later than the next business day:

(b) When a bill drawn payable at the place of business or residence of some person other than the drawee, has been dishonoured by non-acceptance, it must be protested for non-payment at the place where it is expressed to be payable, and no further presentment for payment to, or demand on, the drawee is necessary.

(7.) A protest must contain a copy of the bill, and must be signed by the notary making it, and must specify—

(a) The person at whose request the bill is protested:

(b) The place and date of protest, the cause or reason for protesting the bill, the demand made, and the answer given, if any, or the fact that the drawee or acceptor could not be found.

(8.) Where a bill is lost or destroyed, or is wrongly detained from the person entitled to hold it, protest may be made on a copy or written particulars thereof.

(9.) Protest is dispensed with by any circumstance which would dispense with notice of dishonour. Delay in noting or protesting is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate the bill must be noted or protested with reasonable diligence.

52.—(1.) When a bill is accepted generally presentment for payment is not necessary in order to render the acceptor liable.

(2.) When by the terms of a qualified acceptance presentment for payment is required, the acceptor, in the absence of an express stipulation to that effect, is not discharged by the

Duties of holder as regards drawee or acceptor.

omission to present the bill for payment on the day that it matures.

(3.) In order to render the acceptor of a bill liable it is not necessary to protest it, or that notice of dishonour should be given to him.

(4.) Where the holder of a bill presents it for payment, he shall exhibit the bill to the person from whom he demands payment, and when a bill is paid the holder shall forthwith deliver it up to the party paying it.

Liabilities of Parties.

Funds in
hands of
drawee.

53.—(1.) A bill, of itself, does not operate as an assignment of funds in the hands of the drawee available for the payment thereof, and the drawee of a bill who does not accept as required by this Act is not liable on the instrument. This sub-section shall not extend to Scotland.

(2.) In Scotland, where the drawee of a bill has in his hands funds available for the payment thereof, the bill operates as an assignment of the sum for which it is drawn in favour of the holder, from the time when the bill is presented to the drawee.

Liability of
acceptor.

54. The acceptor of a bill, by accepting it—

(1.) Engages that he will pay it according to the tenor of his acceptance:

(2.) Is precluded from denying to a holder in due course—

(a) The existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the bill;

(b) In the case of a bill payable to drawer's order, the then capacity of the drawer to indorse, but not the genuineness or validity of his indorsement;

(c) In the case of a bill payable to the order of a third person, the existence of the payee and his then capacity to indorse, but not the genuineness or validity of his indorsement.

Liability of
drawer or
indorser.

55.—(1.) The drawer of a bill by drawing it—

(a) Engages that on due presentment it shall be accepted and paid according to its tenor, and that if it be dishonoured he will compensate the holder or any indorser who is compelled to pay it, provided that the requisite proceedings on dishonour be duly taken;

(b) Is precluded from denying to a holder in due course the existence of the payee and his then capacity to indorse.

(2.) The indorser of a bill by indorsing it—

(a) Engages that on due presentment it shall be accepted

and paid according to its tenor, and that if it be dishonoured he will compensate the holder or a subsequent indorser who is compelled to pay it, provided that the requisite proceedings on dishonour be duly taken;

- (b) Is precluded from denying to a holder in due course the genuineness and regularity in all respects of the drawer's signature and all previous indorsements;
- (c) Is precluded from denying to his immediate or a subsequent indorsee that the bill was at the time of his indorsement a valid and subsisting bill, and that he had then a good title thereto.

56. Where a person signs a bill otherwise than as drawer or acceptor, he thereby incurs the liabilities of an indorser to a holder in due course (*n*).

Stranger signing bill liable as indorser.

57. Where a bill is dishonoured, the measure of damages, which shall be deemed to be liquidated damages (*o*), shall be as follows:—

Measure of damages against parties to dishonoured bill.

- (1.) The holder may recover from any party liable on the bill, and the drawer who has been compelled to pay the bill may recover from the acceptor, and an indorser who has been compelled to pay the bill may recover from the acceptor or from the drawer, or from a prior indorser—

- (a) The amount of the bill:

- (b) Interest thereon from the time of presentment for payment if the bill is payable on demand, and from the maturity of the bill in any other case:

- (c) The expenses of noting, or, when protest is necessary, and the protest has been extended, the expenses of protest (*p*).

- (2.) In the case of a bill which has been dishonoured abroad (*q*), in lieu of the above damages, the holder may recover from the drawer or an indorser, and the drawer or an indorser who has been compelled to pay the bill may recover from any party liable to him, the amount of the re-exchange with interest thereon until the time of payment.

- (3.) Where by this Act interest may be recovered as damages, such interest may, if justice require it, be withheld wholly or in part, and where a bill is expressed to be payable with interest at a given rate, interest as damages may or may not be given at the same rate as interest proper.

(*n*) *Jenkins & Sons v. Coomber*, [1898] 2 Q. B. 168; see p. 648, *supra*.

(*o*) *London and Universal Bank v. Clancarty*, [1892] 1 Q. B. 689; *Lawrence v. Willcocks*, [1892] 1 Q. B. 696; *Dando v. Boden*, [1893] 1 Q. B. 318; see p. 457, *supra*.

(*p*) *Ex parte Roberts*, *In re Gillespie* (1886), 18 Q. B. D. 286; *In re English Bank of the River Plate*, *Ex parte Bank of Brazil*, [1893] 2 Ch. 438; see p. 187, *supra*.

(*q*) *In re Commercial Bank of South Australia* (1887), 36 Ch. D. 522.

Transferor
by delivery
and trans-
feree.

58.—(1.) Where the holder of a bill payable to bearer negotiates it by delivery without indorsing it, he is called a “transferor by delivery.”

(2.) A transferor by delivery is not liable on the instrument.

(3.) A transferor by delivery who negotiates a bill thereby warrants to his immediate transferee being a holder for value that the bill is what it purports to be, that he has a right to transfer it, and that at the time of transfer he is not aware of any fact which renders it valueless.

Discharge of Bill.

Payment in
due course.

59.—(1.) A bill is discharged by payment (*r*) in due course by or on behalf of the drawee or acceptor.

“Payment in due course” means payment made at or after the maturity of the bill to the holder thereof in good faith and without notice that his title to the bill is defective.

(2.) Subject to the provisions hereinafter contained, when a bill is paid by the drawer or an indorser it is not discharged; but

(a) Where a bill payable to, or to the order of, a third party is paid by the drawer, the drawer may enforce payment thereof against the acceptor, but may not re-issue the bill.

(b) Where a bill is paid by an indorser, or where a bill payable to drawer's order is paid by the drawer, the party paying it is remitted to his former rights as regards the acceptor or antecedent parties, and he may, if he thinks fit, strike out his own and subsequent indorsements, and again negotiate the bill.

(3.) Where an accommodation bill is paid in due course by the party accommodated the bill is discharged.

Banker pay-
ing demand
draft whereon
indorsement
is forged.

60. When a bill (*s*) payable to order on demand is drawn on a banker, and the banker on whom it is drawn pays the bill in good faith and in the ordinary course of business, it is not incumbent on the banker to show that the indorsement of the payee or any subsequent indorsement was made by or under the authority of the person whose indorsement it purports to be, and the banker is deemed to have paid the bill in due course, although such indorsement has been forged or made without authority.

Acceptor the
holder at
maturity.

61. When the acceptor of a bill is or becomes the holder of it at or after its maturity, in his own right, the bill is discharged (*t*).

Express
waiver.

62.—(1.) When the holder of a bill at or after its maturity

(*r*) *Glasscock v. Balls* (1889), 24 Q. B. D. 13; see p. 445, *supra*.

(*s*) *Capital and Counties Bank v. Gordon*, [1903] A. C. 240; see pp. 84, 190, 243, 286, 289, 495, *supra*.

(*t*) *Nash v. De Freville*, [1900] 2 Q. B. 72.

absolutely and unconditionally renounces his rights against the acceptor the bill is discharged (*u*).

The renunciation must be in writing, unless the bill is delivered up to the acceptor.

(2.) The liabilities of any party to a bill may in like manner be renounced by the holder before, at, or after its maturity; but nothing in this section shall affect the rights of a holder in due course without notice of the renunciation.

63.—(1.) Where a bill is intentionally cancelled by the holder or his agent, and the cancellation is apparent thereon, the bill is discharged. Cancellation.

(2.) In like manner any party liable on a bill may be discharged by the intentional cancellation of his signature by the holder or his agent. In such case any indorser who would have had a right of recourse against the party whose signature is cancelled, is also discharged.

(3.) A cancellation made unintentionally, or under a mistake, or without the authority of the holder is inoperative; but where a bill or any signature thereon appears to have been cancelled the burden of proof lies on the party who alleges that the cancellation was made unintentionally, or under a mistake, or without authority.

64.—(1.) Where a bill or acceptance is materially altered without the assent of all parties liable on the bill, the bill is avoided except as against a party who has himself made, authorized, or assented to the alteration, and subsequent indorsers. Alteration of bill.

Provided that,

Where a bill has been materially altered, but the alteration is not apparent (*w*), and the bill is in the hands of a holder in due course, such holder may avail himself of the bill as if it had not been altered, and may enforce payment of it according to its original tenor (*x*).

(2.) In particular the following alterations are material, namely, any alteration of the date, the sum payable, the time of payment, the place of payment, and, where a bill has been accepted generally, the addition of a place of payment without the acceptor's assent (*y*).

(*u*) *In re George, Francis v. Bruce* (1890), 44 Ch. D. 627; *Edwards v. Walters*, [1896] 2 Ch. 157.

(*w*) *Leeds and County Bank v. Walker* (1883), 11 Q. B. D. 84; see p. 504, *supra*.

(*x*) *Scholfield v. Londesborough*, [1896] A. C. 514; see pp. 281, 371, *supra*; *Imperial Bank of Canada v. Bank of Hamilton*, [1903] A. C. 49; see p. 251, *supra*.

(*y*) *Meyer & Co. v. Decroix, Verley et Cie.*, [1891] A. C. 520; see p. 350, *supra*.

Acceptance and Payment for Honour.

Acceptance
for honour
suprà protest.

65.—(1.) Where a bill of exchange has been protested for dishonour by non-acceptance, or protested for better security, and is not overdue, any person, not being a party already liable thereon, may, with the consent of the holder, intervene and accept the bill *suprà protest*, for the honour of any party liable thereon, or for the honour of the person for whose account the bill is drawn.

(2.) A bill may be accepted for honour for part only of the sum for which it is drawn.

(3.) An acceptance for honour *suprà protest* in order to be valid must—

(a) be written on the bill, and indicate that it is an acceptance for honour:

(b) be signed by the acceptor for honour:

(4.) Where an acceptance for honour does not expressly state for whose honour it is made, it is deemed to be an acceptance for the honour of the drawer.

(5.) Where a bill payable after sight is accepted for honour, its maturity is calculated from the date of the noting for non-acceptance, and not from the date of the acceptance for honour.

Liability of
acceptor
for honour.

66.—(1.) The acceptor for honour of a bill by accepting it engages that he will, on due presentment, pay the bill according to the tenor of his acceptance, if it is not paid by the drawee, provided it has been duly presented for payment, and protested for non-payment, and that he receives notice of these facts.

(2.) The acceptor for honour is liable to the holder and to all parties to the bill subsequent to the party for whose honour he has accepted.

Presentment
to acceptor
for honour.

67.—(1.) Where a dishonoured bill has been accepted for honour *suprà protest*, or contains a reference in case of need, it must be protested for non-payment before it is presented for payment to the acceptor for honour, or referee in case of need.

(2.) Where the address of the acceptor for honour is in the same place where the bill is protested for non-payment, the bill must be presented to him not later than the day following its maturity; and where the address of the acceptor for honour is in some place other than the place where it was protested for non-payment, the bill must be forwarded not later than the day following its maturity for presentment to him.

(3.) Delay in presentment or non-presentment is excused by any circumstance which would excuse delay in presentment for payment or non-presentment for payment.

(4.) When a bill of exchange is dishonoured by the acceptor for honour it must be protested for non-payment by him.

68.—(1.) Where a bill has been protested for non-payment, any person may intervene and pay it *suprà* protest for the honour of any party liable thereon, or for the honour of the person for whose account the bill is drawn. Payment for honour *suprà* protest.

(2.) Where two or more persons offer to pay a bill for the honour of different parties, the person whose payment will discharge most parties to the bill shall have the preference.

(3.) Payment for honour *suprà* protest, in order to operate as such and not as a mere voluntary payment, must be attested by a notarial act of honour which may be appended to the protest or form an extension of it.

(4.) The notarial act of honour must be founded on a declaration made by the payer for honour, or his agent in that behalf, declaring his intention to pay the bill for honour, and for whose honour he pays.

(5.) Where a bill has been paid for honour, all parties subsequent to the party for whose honour it is paid are discharged, but the payer for honour is subrogated for, and succeeds to both the rights and duties of, the holder as regards the party for whose honour he pays, and all parties liable to that party.

(6.) The payer for honour on paying to the holder the amount of the bill and the notarial expenses incidental to its dishonour is entitled to receive both the bill itself and the protest. If the holder do not on demand deliver them up he shall be liable to the payer for honour in damages.

(7.) Where the holder of a bill refuses to receive payment *suprà* protest he shall lose his right of recourse against any party who would have been discharged by such payment.

Lost Instruments.

69. Where a bill has been lost before it is overdue, the person who was the holder of it may apply to the drawer to give him another bill of the same tenor, giving security to the drawer if required to indemnify him against all persons whatever in case the bill alleged to have been lost shall be found again. Holder's right to duplicate of lost bill.

If the drawer on request as aforesaid refuses to give such duplicate bill, he may be compelled to do so.

70. In any action or proceeding upon a bill, the Court or a judge may order that the loss of the instrument shall not be set up, provided an indemnity be given to the satisfaction of the Court or judge against the claims of any other person upon the instrument in question. Action on lost bill.

Bill in a Set.

71.—(1.) Where a bill is drawn in a set, each part of the set being numbered, and containing a reference to the other parts, the whole of the parts constitute one bill. Rules as to sets.

(2.) Where the holder of a set indorses two or more parts

to different persons, he is liable on every such part, and every indorser subsequent to him is liable on the part he has himself indorsed as if the said parts were separate bills.

(3.) Where two or more parts of a set are negotiated to different holders in due course, the holder whose title first accrues is as between such holders deemed the true owner of the bill; but nothing in this sub-section shall affect the rights of a person who in due course accepts or pays the part first presented to him.

(4.) The acceptance may be written on any part, and it must be written on one part only.

If the drawee accepts more than one part, and such accepted parts get into the hands of different holders in due course, he is liable on every such part as if it were a separate bill.

(5.) When the acceptor of a bill drawn in a set pays it without requiring the part bearing his acceptance to be delivered up to him, and that part at maturity is outstanding in the hands of a holder in due course, he is liable to the holder thereof.

(6.) Subject to the preceding rules, where any one part of a bill drawn in a set is discharged by payment or otherwise, the whole bill is discharged.

Conflict of Laws.

Rules where
laws conflict.

72. Where a bill drawn in one country is negotiated, accepted, or payable in another, the rights, duties, and liabilities of the parties thereto are determined as follows:—

- (1.) The validity of a bill as regards requisites in form is determined by the law of the place of issue, and the validity as regards requisites in form of the super-vening contracts, such as acceptance, or indorsement, or acceptance *suprà* protest, is determined by the law of the place where such contract was made (*a*).

Provided that—

(a) Where a bill is issued out of the United Kingdom it is not invalid by reason only that it is not stamped in accordance with the law of the place of issue:

(b) Where a bill, issued out of the United Kingdom, conforms, as regards requisites in form, to the law of the United Kingdom, it may, for the purpose of enforcing payment thereof, be treated as valid as between all persons who negotiate, hold, or become parties to it in the United Kingdom (*a*).

- (2.) Subject to the provisions of this Act, the interpretation (*b*) of the drawing, indorsement, acceptance, or

(a) *In re Boyse, Crofton v. Crofton* (1886), 33 Ch. D. 612; see pp. 116, 345, *supra*.

(b) *Alcock v. Smith*, [1892] 1 Ch. 238, at p. 256.

acceptance *suprà* protest of a bill, is determined by the law of the place where such contract is made.

Provided that where an inland bill is indorsed in a foreign country the indorsement shall as regards the payer be interpreted according to the law of the United Kingdom.

- (3.) The duties of the holder with respect to presentment for acceptance or payment and the necessity for or sufficiency of a protest or notice of dishonour, or otherwise, are determined by the law of the place where the act is done or the bill is dishonoured.
- (4.) Where a bill is drawn out of but payable in the United Kingdom and the sum payable is not expressed in the currency of the United Kingdom, the amount shall, in the absence of some express stipulation, be calculated according to the rate of exchange for sight drafts at the place of payment on the day the bill is payable.
- (5.) Where a bill is drawn in one country and is payable in another, the due date thereof is determined according to the law of the place where it is payable.

PART III.—CHEQUES ON A BANKER.

73. A cheque is a bill of exchange drawn on a banker payable on demand (*c*). Cheque defined.

Except as otherwise provided in this Part, the provisions of this Act applicable to a bill of exchange payable on demand apply to a cheque (*d*).

74. Subject to the provisions of this Act—

Presentment
of cheque for
payment.

- (1.) Where a cheque is not presented for payment within a reasonable time (*e*) of its issue, and the drawer or the person on whose account it is drawn had the right at the time of such presentment as between him and the banker to have the cheque paid and suffers actual damage through the delay, he is discharged to the extent of such damage, that is to say, to the extent to which such drawer or person is a creditor of such banker to a larger amount than he would have been had such cheque been paid.
- (2.) In determining what is a reasonable time regard shall be had to the nature of the instrument, the usage of trade and of bankers, and the facts of the particular case.

(*c*) *Bavins, Junr. and Sims v. London and South Western Bank*, [1900] 1 Q. B. 270; see p. 489, *supra*.

(*d*) Cf. *Gaden v. Newfoundland Savings Bank*, [1899] A. C. 281; see pp. 250, 469, *supra*; *Imperial Bank of Canada v. Bank of Hamilton*, [1903] A. C. 49; see pp. 251, 412, *supra*.

(*e*) *Wheeler v. Young* (1897), 13 T. L. R. 468; see p. 424, *supra*.

- (3.) The holder of such cheque as to which such drawer or person is discharged shall be a creditor, in lieu of such drawer or person, of such banker to the extent of such discharge, and entitled to recover the amount from him.

Revocation
of banker's
authority.

75. The duty and authority of a banker to pay a cheque drawn on him by his customer are determined by—

- (1.) Countermand of payment:
- (2.) Notice of the customer's death (*f*).

Crossed Cheques.

General and
special cross-
ings defined.

76.—(1.) Where a cheque bears across its face an addition of—

- (a) The words “and company” or any abbreviation thereof between two parallel transverse lines, either with or without the words “not negotiable”; or
- (b) Two parallel transverse lines simply, either with or without the words “not negotiable”;

that addition constitutes a crossing, and the cheque is crossed generally.

(2.) Where a cheque bears across its face an addition of the name of a banker, either with or without the words “not negotiable,” that addition constitutes a crossing, and the cheque is crossed specially and to that banker (*g*).

Crossing by
drawer or
after issue.

77.—(1.) A cheque may be crossed generally or specially by the drawer.

(2.) Where a cheque is uncrossed, the holder may cross it generally or specially.

(3.) Where a cheque is crossed generally the holder may cross it specially.

(4.) Where a cheque is crossed generally or specially, the holder may add the words “not negotiable.”

(5.) Where a cheque is crossed specially, the banker to whom it is crossed may again cross it specially to another banker for collection.

(6.) Where an uncrossed cheque, or a cheque crossed generally, is sent to a banker for collection, he may cross it specially to himself (*h*).

Crossing a
material part
of cheque.

78. A crossing authorized by this Act is a material part of the cheque; it shall not be lawful for any person to obliterate or, except as authorized by this Act, to add to or alter the crossing.

(*f*) *In re Beaumont, Beaumont v. Ewbank*, [1902] 1 Ch. 889; see p. 295, *supra*.

(*g*) *National Bank v. Silke*, [1891] 1 Q. B. 435; see pp. 244, 248, 470, *supra*.

(*h*) *Capital and Counties Bank v. Gordon*, [1903] A. C. 240; see pp. 84, 190, 243, 286, 289, 495, *supra*.

79.—(1.) Where a cheque is crossed specially to more than one banker except when crossed to an agent for collection being a banker, the banker on whom it is drawn shall refuse payment thereof. Duties of banker as to crossed cheques.

(2.) Where the banker on whom a cheque is drawn which is so crossed nevertheless pays the same, or pays a cheque crossed generally otherwise than to a banker, or if crossed specially otherwise than to the banker to whom it is crossed, or his agent for collection being a banker, he is liable to the true owner of the cheque for any loss he may sustain owing to the cheque having been so paid.

Provided that where a cheque is presented for payment which does not at the time of presentment appear to be crossed, or to have had a crossing which has been obliterated, or to have been added to or altered otherwise than as authorized by this Act, the banker paying the cheque in good faith and without negligence shall not be responsible or incur any liability, nor shall the payment be questioned by reason of the cheque having been crossed, or of the crossing having been obliterated or having been added to or altered otherwise than as authorized by this Act, and of payment having been made otherwise than to a banker or to the banker to whom the cheque is or was crossed, or to his agent for collection being a banker, as the case may be.

80. Where the banker, on whom a crossed cheque is drawn, in good faith and without negligence pays it, if crossed generally, to a banker, and if crossed specially, to the banker to whom it is crossed, or his agent for collection being a banker, the banker paying the cheque, and, if the cheque has come into the hands of the payee, the drawer, shall respectively be entitled to the same rights and be placed in the same position as if payment of the cheque had been made to the true owner thereof. Protection to banker and drawer where cheque is crossed.

81. Where a person takes a crossed cheque which bears on it the words "not negotiable," he shall not have and shall not be capable of giving a better title to the cheque than that which the person from whom he took it had (*i*). Effect of crossing on holder.

82. Where a banker in good faith and without negligence (*k*) receives payment for a customer (*l*) of a cheque crossed generally or specially to himself, and the customer has no Protection to collecting banker.

(*i*) *Fisher v. Roberts* (1890), 6 T. L. R. 354; see p. 248, *supra*; *National Bank v. Silke*, [1891] 1 Q. B. 435; see pp. 244, 248, 470, *supra*; *Great Western Railway v. London and County Banking Co.*, [1901] A. C. 414, at pp. 418, 419, 422, 424; see pp. 247, 248, 491, 494, *supra*.

(*k*) *Hannan's Lake View v. Armstrong & Co.* (1900), 5 Com. Cas. 188; see p. 488, *supra*; *Bissell v. Fox Brothers & Co.* (1884), 53 L. T. 193; see pp. 289, 488, *supra*.

(*l*) *Great Western Railway v. London and County Banking Co.*, [1901] A. C. 414, at pp. 418, 420, 422, 425; see pp. 491—494, *supra*; *Clarke v. London and County Banking Co.*, [1897] 1 Q. B. 552; see p. 498, *supra*; *Capital and Counties Bank v. Gordon*, [1903] A. C. 240; see p. 495, *supra*.

title or a defective title thereto, the banker shall not incur any liability to the true owner of the cheque by reason only of having received such payment.

PART IV.—PROMISSORY NOTES.

Promissory
note defined.

83.—(1.) A promissory note is an unconditional promise in writing made by one person to another signed by the maker, engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money, to, or to the order of, a specified person or to bearer (*m*).

(2.) An instrument in the form of a note payable to maker's order is not a note within the meaning of this section unless and until it is indorsed by the maker.

(3.) A note is not invalid by reason only that it contains also a pledge of collateral security with authority to sell or dispose thereof.

(4.) A note which is, or on the face of it purports to be, both made and payable within the British Islands is an inland note. Any other note is a foreign note.

Delivery
necessary.

84. A promissory note is inchoate and incomplete until delivery thereof to the payee or bearer.

Joint and
several notes.

85.—(1.) A promissory note may be made by two or more makers, and they may be liable thereon jointly, or jointly and severally according to its tenor.

(2.) Where a note runs "I promise to pay" and is signed by two or more persons it is deemed to be their joint and several note.

Note payable
on demand.

86.—(1.) Where a note payable on demand has been indorsed, it must be presented for payment within a reasonable time of the indorsement. If it be not so presented the indorser is discharged.

(2.) In determining what is a reasonable time, regard shall be had to the nature of the instrument, the usage of trade, and the facts of the particular case.

(3.) Where a note payable on demand is negotiated, it is not deemed to be overdue, for the purpose of affecting the holder with defects of title of which he had no notice, by reason that it appears that a reasonable time for presenting it for payment has elapsed since its issue (*n*).

Presentment
of note for
payment.

87.—(1.) Where a promissory note is in the body of it made payable at a particular place, it must be presented for payment at that place in order to render the maker liable. In any other case, presentment for payment is not necessary in order to render the maker liable.

(2.) Presentment for payment is necessary in order to render the indorser of a note liable.

(3.) Where a note is in the body of it made payable at a

(*m*) *Kirkwood v. Carroll*, [1903] 1 K. B. 531; *Kirkwood v. Smith*, W. N. (1896) 46.

(*n*) *Glascock v. Balls* (1889), 24 Q. B. D. 13; see p. 445, *supra*.

particular place, presentment at that place is necessary in order to render an indorser liable; but when a place of payment is indicated by way of memorandum only, presentment at that place is sufficient to render the indorser liable, but a presentment to the maker elsewhere, if sufficient in other respects, shall also suffice.

88. The maker of a promissory note by making it—

Liability of maker.

- (1.) Engages that he will pay it according to its tenor;
- (2.) Is precluded from denying to a holder in due course the existence of the payee and his then capacity to indorse.

89.—(1.) Subject to the provisions in this Part and, except as by this section provided, the provisions of this Act relating to bills of exchange apply, with the necessary modifications (*o*), to promissory notes. Application of Part II. to notes.

(2.) In applying those provisions the maker of a note shall be deemed to correspond with the acceptor of a bill, and the first indorser of a note shall be deemed to correspond with the drawer of an accepted bill payable to drawer's order.

(3.) The following provisions as to bills do not apply to notes; namely, provisions relating to—

- (a) Presentment for acceptance;
- (b) Acceptance;
- (c) Acceptance *suprà* protest;
- (d) Bills in a set.

(4.) Where a foreign note is dishonoured, protest thereof is unnecessary.

PART V.—SUPPLEMENTARY.

90. A thing is deemed to be done in good faith, within the meaning of this Act, where it is in fact done honestly, whether it is done negligently or not. Good faith.

91.—(1.) Where, by this Act, any instrument or writing is required to be signed by any person, it is not necessary that he should sign it with his own hand, but it is sufficient if his signature is written thereon by some other person by or under his authority (*p*). Signature.

(2.) In the case of a corporation, where, by this Act, any instrument or writing is required to be signed, it is sufficient if the instrument or writing be sealed with the corporate seal.

But nothing in this section shall be construed as requiring the bill or note of a corporation to be under seal.

92. Where, by this Act, the time limited for doing any act or thing is less than three days, in reckoning time, non-business days are excluded. Computation of time.

(*o*) *Leeds and County Bank v. Walker* (1883), 11 Q. B. D. 84; see p. 504, *supra*.

(*p*) *Lewis v. Clay* (1897), 14 T. L. R. 149; see p. 262, *supra*.

“Non-business days” for the purposes of this Act mean—

- (a) Sunday, Good Friday, Christmas Day :
- (b) A bank holiday under the Bank Holidays Act, 1871, or Acts amending it :
- (c) A day appointed by Royal proclamation as a public fast or thanksgiving day.

Any other day is a business day.

When noting
equivalent to
protest.

93. For the purposes of this Act, where a bill or note is required to be protested within a specified time or before some further proceeding is taken, it is sufficient that the bill has been noted for protest before the expiration of the specified time or the taking of the proceeding; and the formal protest may be extended at any time thereafter as of the date of the noting.

Protest when
notary not
accessible.

94. Where a dishonoured bill or note is authorized or required to be protested, and the services of a notary cannot be obtained at the place where the bill is dishonoured, any householder or substantial resident of the place may, in the presence of two witnesses, give a certificate, signed by them, attesting the dishonour of the bill, and the certificate shall in all respects operate as if it were a formal protest of the bill.

The form given in Schedule 1 to this Act may be used with necessary modifications, and if used shall be sufficient.

Dividend
warrants
may be
crossed.
Repeal.

95. The provisions of this Act as to crossed cheques shall apply to a warrant for payment of dividend.

96. [*This section, dealing with the repeal of other enactments, was itself repealed by the Statute Law Revision Act, 1898 (61 & 62 Vict. c. 22).*]

Savings.

97.—(1.) The rules in bankruptcy relating to bills of exchange, promissory notes, and cheques, shall continue to apply thereto notwithstanding anything in this Act contained.

(2.) The rules of common law including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, shall continue to apply to bills of exchange, promissory notes, and cheques.

(3.) Nothing in this Act or in any repeal effected thereby shall affect—

(a) Any law or enactment for the time being in force relating to the revenue (g) :

25 & 26 Vict.
c. 89.

(b) The provisions of the Companies Act, 1862, or Acts amending it, or any Act relating to joint stock banks or companies :

(c) The provisions of any Act relating to or confirming the privileges of the Bank of England or the Bank of Ireland respectively :

(d) The validity of any usage relating to dividend warrants, or the indorsements thereof.

(g) This sub-clause is printed as amended by the Statute Law Revision Act, 1898 (61 & 62 Vict. c. 22).

98. Nothing in this Act or in any repeal effected thereby shall extend or restrict, or in any way alter or affect the law and practice in Scotland in regard to summary diligence.

Saving of summary diligence in Scotland.

99. Where any Act or document refers to any enactment repealed by this Act, the Act or document shall be construed, and shall operate, as if it referred to the corresponding provisions of this Act.

Construction with other Acts, &c.

100. In any judicial proceeding in Scotland, any fact relating to a bill of exchange, bank cheque, or promissory note, which is relevant to any question of liability thereon, may be proved by parole evidence: Provided that this enactment shall not in any way affect the existing law and practice whereby the party who is, according to the tenor of any bill of exchange, bank cheque, or promissory note, debtor to the holder in the amount thereof, may be required, as a condition of obtaining a sist of diligence, or suspension of a charge, or threatened charge, to make such consignation, or to find such caution as the Court or judge before whom the cause is depending may require.

Parole evidence allowed in certain judicial proceedings in Scotland.

This section shall not apply to any case where the bill of exchange, bank cheque, or promissory note has undergone the sesennial prescription.

SCHEDULES (*r*).

FIRST SCHEDULE.

Form of protest which may be used when the services of a notary cannot be obtained. Section 94.

Know all men that I, A. B. [*householder*], of _____ in the county of _____, in the United Kingdom, at the request of C. D., there being no notary public available, did on the day of _____, 188____, at _____, demand payment [*or acceptance*] of the bill of exchange hereunder written, from E. F., to which demand he made answer [*state answer, if any*] wherefore I now, in the presence of G. H. and J. K. do protest the said bill of exchange.

(Signed) A. B.

G. H. }
J. K. } Witnesses.

N.B.—The bill itself should be annexed, or a copy of the bill and all that is written thereon should be underwritten.

(*r*) The Second Schedule, which comprised a list of enactments repealed by this Act, was itself repealed by the Statute Law Revision Act, 1898 (61 & 62 Vict. c. 22).

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